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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~1024~~. 620

CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED MAY 20, 1895.

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of—

UNITED STATES *vs.* CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL.	Indictment for murder. No. 106.

1 *Indictment.*

UNITED STATES OF AMERICA,
Western District of Arkansas:

In the circuit court, Feb. term, A. D. 1895.

UNITED STATES *vs.* CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL.	Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Crawford Goldsby, alias Cherokee Bill, on the 18th day of Nov., 1894, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Ernest Melton, a white man, and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Crawford Goldsby, alias Cherokee Bill, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Crawford Goldsby, alias Cherokee Bill, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Ernest Melton; and that the said Crawford Goldsby, alias Cherokee Bill, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Crawford Goldsby, alias Cherokee Bill, discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Ernest Melton, in and upon the right side of face and back of the head of him, the said
2 Ernest Melton, giving to him, the said Ernest Melton, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid, by the said Crawford Goldsby, alias Cherokee Bill, in and upon the right side of the face and back of the head of him, the said Ernest Melton, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Ernest Melton, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Crawford Goldsby, alias Cherokee Bill, him, the said Ernest Melton, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought,

did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Ark.

(Endorsed on back :) No. 106. United States vs. Crawford Goldsby, alias Cherokee Bill. Murder. A true bill. L. H. Southmayd, foreman. Witnesses :

John Shufeldt, Lenapah, I. T.	Harry Clark, Lenapah, I. T.
Levy Smith, " "	John A. Smith, Lenapah, I. T.
W. S. Melton, Paris, Texas.	W. C. Smith, Dep. U. S. marshal.
Henry C. Shufeldt, Lenepah, I. T.	John Beard, Lenapah, I. T.
Mrs. John Grove, Lenepah, I. T.	Mrs. John Cratsburg, Lenapah, I. T.
John Grove, Lenepah, I. T.	Morman Everts, Nowata, I. T.
Henry Bascom Nowata, I. T.	Rob Hall, Nowata, I. T.
Jim Hall, Nowata, I. T.	Bill Hall, Nowata, I. T.
Arthur Dodge, Nowata, I. T.	Bob Harris, Lenepah, I. T.
Adrian Swope, Lenepah, I. T.	Ben Vann, Lenapah, I. T.
Mrs. John Groves, Lenepah, I. T.	John Groves, Lenepah, I. T.
Flem Harter, Lenepah, I. T.	Minerva Harris, Wagoner, I. T.
Tom Harris, Wagoner, I. T.	Payden Tolbert, Vinita, I. T.
Jno. Yost, Kansas City, Mo.	Charles Patton, Sapulpa, I. T.
Dink Vann, Claremore, I. T.	Jake Elliott, Sapulpa, I. T.

Filed in open court Feb'y 8th, 1895. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, Feb. term, 1895.

FRIDAY MORNING, 8½ O'CLOCK, *Feb.* 7, 1895.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL. } Indictment for murder. No. 106.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

TUESDAY, *Feb.* 12, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of John Vann, Clarence Goldsby, Frank Blackman, Wm. Vann, Alx. Cochran, Mrs. Cochran, Joe Nave, Thos. Lowe, Joe Roach, Jas. Turley, John Foreman, Wm. Vance, Robt. Turner, Bert Gray, and George Marcum, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable Feb. 19, 1895.

4 SATURDAY, *Feb.* 16, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files an additional application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

MONDAY, *Feb.* 18, 1895.

(Caption omitted.)

On this day come on to be heard the application for witnesses in this cause, filed Feb. 16, 1895, and the court, being fully advised in the premises, doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Sam Candy, Wm. Smith, Geo. Merrill, one Ross, A. R. Vanmeter, and John Ross, in behalf of said defendant, by paid by the United States, and that a subpœna be issued for them, returnable Feb. 20, 1895.

TUESDAY, *Feb.* 19, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application praying for additional witnesses in his behalf at the expense of the United States.

Said application coming on to be heard, and the court, being fully advised in the premises, doth overrule said motion.

SATURDAY, *Feb.* 23, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his motion for a continuance in this cause. Said motion coming on to be heard, and the court, being well and sufficiently advised in the premises, doth overrule said motion.

5 MONDAY, *Feb.* 25, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Thos. H. Barnes, esq., and J. W. Reed, esq., and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in

this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit:

Preston Ballantine, Asa B. Clark, Luther A. Coger, Thos. P. Davis, Leonard W. Dobbs, Jas. C. Dooley, Ben. F. Donathan, Martin East, Elijah H. Gray, Geo. T. Galloway, Gilson L. Gray, John Henson, twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a statement of the case by counsel and hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together, and that the marshal of this
6 district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

TUESDAY, *Feb.* 26, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, Thos. H. Barnes, esq., and J. W. Reed, esq.; and now come the jury heretofore empaneled for the trial in this cause, in charge of a sworn bailiff of this court, to wit:

Preston Ballantine, Asa B. Clark, Luther A. Coger, Thos. P. Davis, Leonard W. Dobbs, Jas. C. Dooley, Ben F. Donathan, Martin East, Elijah H. Gray, Geo. T. Galloway, Gilson L. Gray, John Henson, who took their seats in the jury box, and after hearing the remainder of the evidence and the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

WEDNESDAY, *Feb.* 27, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, Thos. H. Barnes, esq., and J. W. Reed, esq.; and now com' the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

Preston Ballantine, Asa B. Clark, Luther A. Coger, Thos. P. Davis, Leonard W. Dobbs, Jas. C. Dooley, Ben F. Donathan, Martin East, Elijah H. Gray, Geo. T. Galloway, Gilson L. Gray, John Henson, who
7 took their seats in the jury box and received the charge of the court in this cause, to which said charge the defendant, by his counsel, in the presence of the jury, filed his exceptions. Whereupon said jury retired,

in charge of the sworn bailiff aforesaid, to consider of their verdict, and after a short time returned into court the following verdict, to wit:

"We, the jury, find the defendant, Crawford Goldsby, alias Cherokee Bill, guilty of murder as charged in the within indictment."

(Signed) MARTIN EAST, *Foreman.*

On motion of defendant, by his attorney, the jury was polled, and each juror answered for himself that the verdict as read by the court was his verdict.

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

8 In the circuit court of the United States for the western district of Arkansas, Feb. term, 1895.

SATURDAY MORNING, 8½ O'CLOCK, *April* 13, 1895.

The court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES, *vs.* CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL. } Indictment for murder, No. 106.

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Crawford Goldsby, alias Cherokee Bill, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict *of* guilty heretofore returned against him by the jury in this cause on the 27th day of February, 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Crawford Goldsby, alias Cherokee Bill, be deemed, taken, and adjudged guilty of the crime of murder, for wilfully and of his malice aforethought killing Ernest Melton, and it is ordered by the court that the said marshal of the district aforesaid cause the said Crawford Goldsby, alias Cherokee Bill, be taken hence, and him, the said Crawford Goldsby, alias Cherokee Bill, safely and securely keep from the date hereof until Tuesday, the 25th day of June, A. D. 1895, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Crawford Goldsby, alias Cherokee Bill, to be

9 taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said 25th day of June, in the year of our Lord one thousand eight hundred and ninety-five, cause the said Crawford Goldsby, alias Cherokee Bill, to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same

MONDAY, *April* 29, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his bill of exceptions in the above-entitled cause, and asks that the same be signed and made a part of the record in said cause, which is accordingly done.

SATURDAY, *May* 4, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, J. Warren Reed, esq., and files his assignment of errors, and petition for a writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

MAY TERM, 1895, *Monday*, *May* 13, 1895.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error taking this cause to the Supreme Court of the United States has been issued by the said clerk.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced in this cause be stayed pending the action of the Supreme Court.

10 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas, February term, 1895.

UNITED STATES, *vs.* CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL. } Indictment for murder No. 106.

Be it remembered that on the 8th day of February, 1895, the grand jury returned into court a true bill for murder against the above named defendant, upon which indictment said defendant was arraigned and pleaded not guilty. And that upon the 12th day of February defendant filed an application for twenty witnesses at the expense of the Government, which application was allowed for sixteen witnesses. Defendant also embodied in his application a motion for a continuance, which motion was by the court overruled and the case set for trial Feb. 19, to which overruling of

motion and disallowance of part of witnesses applied for defendant at the time excepted. Said application and motion was in words and figures as follows, to wit:

UNITED STATES COURT,
Western District of Arkansas:

UNITED STATES
vs. } Murder.
CRAWFORD GOLDSBY,

Comes defendant and states to the court that he can not safely proceed to trial under Indictment No. 106, charging him with the crime of murder, without the testimony of the following witnesses:

11 John Vann, Clarence Goldsby, Frank Blackman, William Vann, Ellen McGee, Manda Forester, Ft. Gibson, I. T.; Alex Cochran, Joe Nave, Mrs. Cochran, a man whose name unknown to defendant, Claremore, I. T.; Tom Low and his wife Joe Roach and his wife, James Turley and his wife Acey, Mary Hendricks, Tuck Roach and his wife, John Foreman and his wife, Tulsa, I. T.; William Vance and his wife, Red Fork, I. T.; Robert Turner and his wife, Red Fork, Creek Nation; Bert Grey, Red Fork, Creek Nation; George Marcum, Choteau, Ind. Ter.

By said John Vann, Clarence Goldsby, Frank Blackman, William Vann, Ellen McGee, and Manda Forester, this defendant can prove that on the night preceding the day before the allegad robbery and murder defendant stayed at Fort Gibson, Cherokee Nation, Ind. Ter., which is at least 100 miles by the country roads from the town of Lenapah, the place where the alleged robbery and murder is claimed by the prosecution to have been committed. That the morning of the day before the alleged robbery and murder defendant started from said town, Fort Gibson, on horseback to go 6 miles southeast of Claremore, Cherokee Nation. And defendant states that on said day before the alleged robbery and murder he traveled across the country on horseback a distance of about 45 miles by the country roads, to a place six miles southeast of Claremore, Cherokee Nation, where defendant staved all night the night before the day on which said robbery and murder is claimed by the prosecution to have been committed at Lenepah at about one o'clock p. m., which place, six miles southeast of Claremore where defendant stayed over night the night before said robbery and murder, is about 55 miles by the country roads from

12 Lenepah, the place of said alleged robbery and murder. Defendant asks for said witnesses at Fort Gibson to show that taken in connection with witnesses hereinafter asked for that going on horseback the way the defendant was then traveling (and the way defendant is informed it is claimed that the parties who committed said robbery were traveling), it would be physically impossible for defendant to have reached Lenepah (the place of the alleged robbery and murder) from Fort Gibson at one o'clock p. m. in the day of the alleged robbery and murder (being the time in the day that it is claimed by the prosecution that the alleged robbery and murder was committed at Lenepah, Cherokee Nation.)

By said Alex Cochran, Joe Nave, and Mrs. Cochran defendant can prove that defendant stayed over night 6 miles southeast from Claremore

the night preceding the day of the alleged robbery and murder, and left on horseback the morning of the day of the alleged robbery and murder, going in the direction of Tulsa, Creek Nation.

And by a man whose name is to defendant unknown, but whom defendant can procure if a continuance be granted him until next term of this court, that witness rode horseback with defendant some two miles on the road toward Tulsa, Creek Nation, on said morning of the day of said alleged murder.

And by said Tom Low and his wife defendant can prove that he (deft.) came on horseback to the house of said Low, about 8 miles west of Tulsa, Creek Nation, before noon of the day on which the alleged robbery and murder is claimed to have been committed.

Defendant states that it is about 65 miles by the country roads from the home of said Thomas Low in the Creek Nation to Lenepah, the place of the alleged robbery and murder. And defendant will ffurther prove by said Thomas Low and his wife that the day on which defendant came to their house said Tom Low went to Tulsa, Creek Nation, in the afternoon of said day, and there learned of the alleged robbery and murder
13 at Lenepah, Cherokee Nation, which come to Tulsa by telegram, and said Low learned of said robbery and murder at Tulsa on said day, and came in the afternoon of the same day and informed his family and this defendant of the news so received at Tulsa of the alleged robbery and murder.

And by said Joe Roach and his wife, who live one half mile from the said Tom Low, defendant will prove that he (deft.) came from toward said Tom Low's to their house on the evening of the day of the alleged robbery and murder, and informed them of the report of the alleged robbery and murder as coming from said Tom Low, who had heard the same at Tulsa on said day; and the next day after defendant left, going to Hendricks, said Roach heard of said robbery and murder from several sources as having been committed the day before. And after remaining a short time at said Roach's, defendant started on horseback in the direction of James Turley, who lives about three miles southwest of said Roach's and about eleven miles from Tulsa.

By said James Turley, Acey Turley, his wife, and Mary Hendricks defendant can prove that he got to their house, five miles last from Tulsa, Creek Nation, about sundown of the day of the alleged robbery and murder, a distance of about 68 miles from Lenepah, the place of said murder; and that defendant came on horseback from toward said Roache's and reported the said murder to them as coming from said Tom Low, who had learned the same in Tulsa on that day, as before stated; and that said Hendricks learned the next day of said murder from other sources as having been committed on the same day defendant was at their house, 68 miles from Lenepah, the place of said alleged murder.

And by Tuck Roach and his wife, who live three miles from said
14 Hendricks, defendant can prove that he (deft.) came to their house after night awhile of the day of the alleged murder, and remained but a short time, and started on horseback in the direction of John Foreman's.

And by John Foreman and wife defendant can prove that he came to their house near midnight of the day of the alleged murder, which is

about ten miles from said Tuck Roach's, and that defendant stayed a few hours at said Foreman's and warmed himself, and started on in the night following the day of the said alleged murder.

And by William Vance and his wife defendant can prove that defendant came to their house on horseback about ten o'clock of the next day after the day of the alleged murder; that said Vance lives about three miles south of Red Fork, in the Creek Nation, about 75 miles from Lenepah, Cherokee Nation, the place of the alleged murder, and that defendant got dinner at said houses on the next day after the day of the alleged murder, and then went about four miles to Robert Turner's, which he can prove by said Turner and his wife. And will also prove by said Vance and his wife and said Turner and his wife that on the day defendant was at their houses, which was the day after the day of the alleged robbery and murder, said last-named four witnesses heard all about the alleged robbery and murder, the same having come to Red Fork by telegram, and that the same had been committed at Lenepah, in the Cherokee Nation, about 75 miles from where defendant then was, and that it was committed on the day before defendant was at their houses, rendering it impossible that defendant could have been at the place of the alleged robbery and murder at the time the same is claimed to have been committed, or participated therein.

By said Bert Gray defendant can prove that certain articles of clothing which defendant now has on his person and in his possession, and by which Government witnesses claim to identify defendant at the time of the alleged robbery and murder, were purchased by defendant from witness long after the time the alleged robbery and murder is claimed to have been committed, and were not in defendant's possession at the time of said murder.

By George Marcum defendant can prove that at the time of the alleged robbery and murder defendant had no such gun in his possession; neither did he own such gun as it is claimed by the prosecution that deceased Melton was shot with, at the time of the alleged robbery and murder. Defendant states that he was indicted for the alleged robbery and murder by the grand jury for this court on the day of Feb., 1895.

That the filing of said indictments for said robbery and murder was the first knowledge that defendant had received that he was charged with robbery and murder at Lenepah. That defendant has made his best effort to prepare his defense to said charges and file this his application for witnesses on his behalf herein.

But that at the time of filing said indictments and defendant's arraignment thereon on the day of Feb., 1895, and for some time previous thereto, defendant was confined and is now confined in the United States jail at Fort Smith, Ark., for this court. That since his confinement in said jail, and recently, he (def't) has been sick with chills and fever and is now very sick with fever and the mumps, and it is with great suffering and pain and with much discomfort that defendant is enabled to consult with his attorney for the preparation of his defense. Defendant declares his innocence of the alleged robbery and murder and that he was not there nor did he participate therein. That the time has been so short since the knowledge of said charge came to him, and that he has been

arraigned thereon, that he is now unable to apply for further witnesses that he can procure if time be allowed him to further prepare his defense.

16 That he is informed of other witnesses and facts which defendant believes he can procure, but of which he has not now sufficient knowledge (or has his attorneys) to enable defendant to apply for them, but that if further time be allowed him he believes he can procure, which witnesses and facts, together with those herein applied for, will fully show defendant's innocence of the alleged charges of robbery and murder at Lenepah. Defendant is informed and believes that he can procure a number of witnesses who are not now in attendance on the court, who, as well as those now here on behalf of the Government, saw the persons who committed the alleged robbery and murder, and who know and will testify that defendant is not one of the men who participated in said robbery and murder, but that while defendant is thus informed, yet from the shortness of time and being confined in jail and being totally without money or means to help himself, is now unable to state the names of said persons, and therefore prays the court to grant him time to further prepare his defense. And for the reasons aforesaid defendant moves the court to grant him a continuance of the alleged causes of robbery and murder until the next term of this court, and in duty bound will ever pray.

Defendant states that said facts are true and material to his defense; that he is poor and pecuniarily unable to procure the attendance of said witnesses at his own expense; therefore prays process of subpœna at the expense of the United States in good faith, and not for delay but that justice may be done him.

CRAWFORD GOLDSBY.

Subscribed and sworn to before me this 12th day of Feb., 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed in open court Feb. 12, 1895. S. Wheeler, clerk.

17 That on the 16th day of Feb., 1895, the defendant filed a second application for additional and newly discovered witness, in words and figures as follows:

UNITED STATES DISTRICT COURT,
Western District of Arkansas:

UNITED STATES
vs. } Robbery & murder.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL.

Comes the defendant and states to the court that in addition to witnesses heretofore allowed him he can not safely go to trial under indictments No. , and No. , without the testimony of the following witnesses, who have come to defendant's knowledge since filing his last application herein:

Sam Candy, 4 miles east Claremore, I. T., near R. road; William Smith, Brentwood, first station south Wister Junction, Choctaw Nation,

Frisco R. R.; George Merrill, 4 miles east of Lenepah; a butcher at Nowata, Cherokee Nation, I. T., named Ross; A. R. Van Meter, lives at Lenepah, Cherokee Nation; John Rose, carpenter, at Lenepah, Cherokee Nation.

By said Sam Candy (who is the same man named in defendant's former application, whose name was then unknown to defendant, has since *learned*, and who is an old and reliable citizen of the Cherokee Nation) defendant can prove that witness lives about 4 miles east of Claremore, Ind. Ter., and that witness Candy, on the morning of the alleged robbery and murder at Lenepah, and about fifty miles from said place, Lenepah, rode on horseback with defendant near Claremore, Ind. Ter., about two miles on the road, as defendant was going toward Tulsa,
18 Creek Nation; and that witness is well acquainted with the country from where he saw defendant on the morning of the alleged murder at Lenepah; and will prove it to have been impossible for defendant from the time of being on the road with witness to have reached Lenepah at the time of the alleged murder, going on horseback as defendant was then traveling.

By said William Smith, said George Morrill, said Butcher Ross, Nowata, Cherokee Nation, defendant can prove that on the day and at the time of the alleged robbery and murder said last-named three witnesses were all in the town of Lenepah, where said robbery and murder are claimed to have been committed; and that said witnesses all saw the two men on horseback who committed said robbery and murder and looked at them; that said witnesses all know this defendant, said Morrill and Smith having known defendant for many years, and will all swear and prove that this defendant was not one of the two men who committed said robbery and murder at John Shoefeldt's store in Lenepah, Ind. Ter., on November 9th, 1894, as claimed by the prosecution, nor was defendant there at said robbery, or in company with the alleged robbers, or in said town.

By said R. A. Van Meter defendant can prove that witness clerks in a store, near where the store of John Shoefelt is located, in the town of Lenepah, where the alleged robbery and murder was committed, and that said Government witness John A. Smith was not at the store of said Shoefelt at the time of said murder, as said Smith now claims, nor at no time while said robbery was going on, nor did said Smith see or recognize said robbers or either of them; that said Smith was not where he could see the said robbers, but that he was away near the edge of the town while said robbery was going on, and when said robbery was over and the said robbers had left town and were gone most out of sight, said Smith came from toward the section house (near the edge of the town), and made
19 inquiry of witness Van Meter as to what had happened and what was going on, and at that time said he knew nothing whatever of the alleged robbery and murder.

By said John Rose defendant can prove that witness is a carpenter and lives in Lenepah; that he knows prosecuting witness Bob Gaskins; that at the time of the alleged robbery said Gaskins came running to where witness was at Mr. Vann's house out of breath and terribly excited, and reported that he (Gaskins) has heard that a robbery was going on down town and they would all be killed, and could not tell anything about who the robbers were—that he had not seen them; and said Gaskins, in com-

pany with some women, ran on out of town in another direction from the place of the alleged robbery, and said Gaskins could not have seen the robbers nor have known them; and that his claim now to seeing said robbers and recognizing this defendant as one of them is wholly false and untrue.

Defendant states that said facts are true and material to his defense; that defendant is now confined in the jail of this court, and is poor and totally without money or means to secure the attendance of said witnesses at his own expense; that said witnesses all reside within the jurisdiction of this court, and are material and indispensible witnesses in defendant's behalf on the trial of his case, and therefore defendant prays that said witnesses be subpœnaed at the expense of the United States, in good faith and not for delay.

CRAWFORD GOLDSBY.

Subscribed and sworn to before me this 16 day of Feb., 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed in open court Feb. 16, 1895. S. Wheeler, clk.

20 Which was by the court on the 18th day of Feb., 1895, allowed and subpoenas duly issued thereon.

That on the 19th day of Feb., 1895, defendant filed a third application for two additional witnesses, in words and figures as follows:

UNITED STATES DISTRICT COURT,
Western District of Arkansas:

UNITED STATES
vs.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL. } Murder.

Comes the defendant and states to the court that in addition to witnesses heretofore allowed to him he cannot safely proceed to trial under Indictment No. 106, charging him with the murder, without the testimony of the following witnesses, who reside at Wagoner, Creek Nation, and within the jurisdiction of this court, and which witnesses and what they will testify to have come to the knowledge of this defendant since filing his last application in this case on the 16th day of Feb., 1895:

Tom Harris and Minerva Harris; both reside at Wagoner, Creek Nation, 85 miles from Forth Smith, Ark., on the railroad to Fort Smith.

By said Tom and Minerva Harris defendant can prove that on Friday, the 9th day of Nov., 1894, the day of the alleged robbery of Shoefelt's store and said murder, said two witnesses were going in a wagon to the town of Lenepah, the place of said murder, and the two men who were the alleged robbers passed said witnesses going into Lenepah and went on in said town ahead of witnesses and committed said robbery and murder, and were just coming out of said town when witnesses met them, passing very close to them and seeing them plain, and went on into said

town and seeing the confusion were informed of said robbery and
21 murder, and said witnesses will both swear and prove that they know defendant and that neither one of said men or robbers was this defendant, nor was defendant with them on said road or in sight of said witnesses when they met said alleged two robbers on horseback, nor did they see defendant that day. Defendant states that said facts are true and that said witnesses are material to his defense; that defendant is now confined in the jail of this court, is poor and totally without money or means to procure the attendance of said witnesses at his own expense; therefore prays process of subpœna at the expense of the United States in good faith and not for delay, but that justice be done him.

CRAWFORD GOLDSBY.

Subscribed and sworn to before me this 19th day of Feb., 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed Feb. 19, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

Which was by the court overruled, to the overruling of which defendant at the time excepted.

That on the 23rd day of Feb., 1895, defendant filed a motion for a continuance of this cause to the next term of the court, which motion embodied also with it an application for eight additional newly discovered witnesses, which motion and application are in words and figures as follows:

UNITED STATES CIRCUIT COURT,
Western District of Arkansas:

UNITED STATES
vs.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL. } Murder. No. 106.

22 Comes the defendant and moves the court to continue the trial of his case, No. 106, charging him with murder, until the next term of this court, on account of the absence of the following witnesses, who were allowed him at this term, as will appear from his applications now on file, which are numbers 106 and are first and second, and which are referred to and hereby made a part of this motion, the names of which witnesses are as follows: Alex. Cochran and George Marcum, named in application 106; also William Smith and one Butcher, whose name defendant has learned was Ross, named in defendant's second application, No. 106. Said Cochran and Marcum were allowed to defendant on the 12th day of February, 1895, and the latter two witnesses above named were allowed to defendant on the 16th day of February, 1895, and subpœnas were at once placed in the hands of the marshal of this court, and defendant has used all the diligence in his power to procure the attendance of said witnesses, whose testimony is true and material to his defense, as will appear from the applications referred to.

As a further ground of continuance, defendant states that since filing his third application, No. 106, which was by the court overruled, defendant has learned of the following additional witnesses, who reside near Lenepah, Cherokee Nation, the place of the alleged killing, and by whom he can prove as follows:

By Sam Vann, that he (Vann) was in Lenepah at the time of the alleged killing and saw the two men who committed the same and who robbed Shufelt's store, and that one of said robbers was an Indian named Jim French, whom witness knew, and that the other man or robber was a white man, and not this defendant, who is a Cherokee freedman and colored man; and that defendant, who is known by said witness, was not present with said robbers, who are alleged to have done said killing.

23 By Eddie Faister, that on the day of the alleged killing said witness met Jim French, whom witness knew, and a white man, about a mile and a half from Lenepah, going into town, Lenepah, and this defendant was not with them. This was near the time in the day of the alleged killing.

By James Yost, whose home is in Lenepah, Cherokee Nation, but who is now in Kansas City, Mo., temporarily and on business, but will return very soon, defendant can prove that witness was in Lenepah at the time of the alleged killing and saw the two men who robbed Shufelt's store and done said killing, and will show that one of said men or robbers was a small man, who was an Indian and not this defendant, and that the other man or robber was a white man and not this defendant, who is a Cherokee freedman, and that this defendant was not present at said killing nor about there; and will also show that Shufelt's, whose store was robbed and who are witnesses for the Government, and who claimed to see said robbers also, stated soon after said robbery, in describing the same, that one of said robbers was an Indian, a small man, and the other a white man, and said two Shoefelt's claimed to have seen them close and fairly and thus described them, while now, as defendant is informed, said Shoefelt's are going to put this defendant in the place of said white man and claim that defendant was present at said robbery.

By Bob Harris, who lives at Lenepah, Cherokee Nation, this defendant can prove that witness was also present on the streets of Lenepah and saw said robbers who committed the alleged murder, and they were an Indian and a white man, and this defendant was not one of saod robbers nor present with them nor about there.

24 By Bud McGirl, who lives a few miles from said town of Lenepah, in the Cherokee Nation, defendant can prove that witness was in Lenepah at the time of the alleged killing and saw the two men who done the same and robbed Shoefelt's store, and that one of said men was an Indian and the other a white man, and not this defendant, and that defendant was not present at said robbery and killing nor about there.

By Jim Rogers, who lives 7 miles east of Lenepah, Cherokee Nation, can prove that John Shufelt, Government witness, and who was robbed as aforesaid, saw said robbers plainly as he claimed and stated to witness right after said robbery, and stated to witness that one of said robbers (the small man) was an Indian and the other a white man, while defendant is of the colored race.

By Katie Vann, who lives in Lenepah, Cherokee Nation, defendant can prove that John Shufelt and old man Shufelt, and others of the Govern-

ment witnesses, who were at and about said Shoefelt's store, and who saw said robbers immediately after said robbery, stated and claimed that said robbers were an Indian and a white man, and that the small man was the Indian, while defendant is a Cherokee freedman, and of the African descent, and a different man altogether.

By Grandison Little, who lives near said Lenepah, and was in town at time of said killing and saw said two robbers, and will prove that one of said robbers was an Indian and small man and the other a white man and not this defendant, either of them, nor was defendant present.

Defendant asks that said additional witnesses be allowed him, as the facts he can prove by them are true and material to his defense; and defendant states that if said witnesses are allowed him and time given him until the next term of this court their attendance can be secured. Defendant states that he has recently been arrested, and since then confined in prison; that he has used due diligence in preparing for his trial.

25 Wherefore, and for the reasons above set forth, defendant asks: First, that being poor and destitute, and wholly without money or means to procure the attendance of said last-named seven witnesses at his own expense, that process of subpœna be allowed him at the expense of the United States. Second, and that said testimony is true, and material to his defense; and for all the reasons above set forth that a continuance of his said trial or cause be granted him until the next term of this court.

CRAWFORD GOLDSBY.

Subscribed and sworn to before me this 22 day of February, 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

Sworn to before me this 23rd day of Feb., 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed in open court Feb. 22, 1895. S. Wheeler, clerk.

Which motion and application, on the 23rd day of Feb., 1895, being considered by the court, was overruled, to the overruling of which the defendant at the time excepted.

And that on*b* the 25th day of Feb., 1895, at the Feb. term of said court, which began on the 4th day of February, 1895, this cause came on to be tried. Whereupon the United States, to maintain the issue upon its part, introduced and examined the following-named witnesses:

John Shufelt, W. S. Melton, Harry Clark, Levy Smith, John A. Smith, Flem Harter, Mrs. John Groves, John Beard, W. C. Smith, Ben Vann, Paden Tolbert, map of Indian Territory, Charley Patton, whose testimony and the exceptions taken thereto by the defendant at the time are in words and figures as follows:

26 JOHN SCHUFELDT, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. You live at Lenapah, in the Indian Territory?

Answer. Yes, sir.

Q. That is in the Cherokee Nation?

A. Yes, sir.

Q. What is your business there?

A. I am a merchant; deal in general merchandise; postmaster also.

Q. How long have you been there?

A. I have been in business there—it will be five years this spring, I believe.

Q. Are you a citizen up there?

A. Yes, sir.

Q. Did you know Earnest Melton in his lifetime?

A. Yes, sir.

Q. Was he a white man or an Indian?

A. He was a white man.

Q. Did you see his body after he was killed?

A. Yes, sir; I saw it just a few minutes after he was killed.

Q. Go on and tell us the whole of that robbery and killing. Tell how the parties came up, and what was done, and so on.

A. It was about one o'clock in the day, as near as I can get at it, and there was two men rode up there at the store, and jumped off their horses, and came up on the platform or scales—we had scales in front of our store—and they run up on that, and my father was out there; and they punched him with their guns, and told him to go inside there; and he didn't obey the orders right away, and they punched him again, cussed him, and told him to go in there, and he came inside.

Mr. J. WARREN REED (of counsel for defendant). Were you
27 in hearing of that?

The WITNESS. Yes, sir; I was right on the inside of the store. I was standing there watching them. I thought it was some of the boys, fooling, probably; and they run him inside, and that fellow over there threw his gun on me——

The ASSISTANT DISTRICT ATTORNEY. That is this defendant?

A. Yes, sir; he says, "Throw up your hands, you son-of-a-bitch," and I throwed up my hands and came around on the west side of the counter where he was, and he told us to get our money out there. My father told him to just wait a moment and he would. "Well," he says, "hurry up, and don't be so slow about it." He says, "Go back and get the money back there." And so he took me and my father back into the office where we have our safe, and the safe was open, I believe—I think I opened it that morning and I left the door open—and my father went to the safe, and he told him to get the money out of there, and he took out a little drawer that the money was in, and started to hand it to him, and he says, "Don't you come to me with it; set it up there, and I will get it," and he started to step in behind the fellow over there, and he drew up his gun and said, "Go around this way, you son-of-a-bitch, and don't get behind me," and so he stepped over by the side of me, and he reached up and got all the money there was, and then he pulled the papers out of the safe, and he asked me if there was any more money in there, and I told him that was all there was, what there was in the drawer.

Q. That was the defendant?

A. Yes, sir; he says, "If I find any more in here I will kill you, you son-of-a-bitch," and I said, "All right;" and he hauled the
28 papers out of the safe, and then he went to the desk and stirred the papers all up there, and he didn't find any more; and then he told us to get out of there, and he followed us on out to about the center of the store. The store faces east and west, and we have a double side door right about the center of the north side; and he followed us from the back end of the store to right opposite that door, and he had his gun on me and my father, and just as he got opposite that door he turned his head and looked out of the door to see what was going on, and as he done that he looked across there and saw this man standing at the window, and he shot through that double door across through that window, and killed this man. This building that this man was in was setting the same way ours was—north and south—and our double door opened out on the south, and that was a side window he was standing at, and so the window and this door faced one another, and he shot across there and killed him.

Q. Did you see the body after the shooting?

A. Yes, sir.

Q. Where was Melton hit?

A. Right under the right eye.

Q. Did the ball come out?

A. The ball went clear through and came out the back of his head—went through the back of his head. He had his hat on and it went through that. He must have had his hat tipped up. It went through the hat band on the right side and lodged in the wall on the other side of the building.

Q. How long after he was shot did you see him?

A. Well, just as quick as they could finish up the job there. It must have been five or ten minutes before I saw him after they got away.

Q. He was, of course, dead when you saw him?

A. Yes, sir.

Q. Did the defendant, when he fired that shot, say anything?

29 A. He just throwed up the gun, and he says, "You son-of-a-bitch," and pulled his gun that way. He just said, "You son-of-a-bitch," and pulled his gun.

Q. What did they do then?

A. While we were back in the office one of my clerks had come down from dinner, and he got inside, and his partner he had him line up there behind the counter, and as he stepped in the door he stepped behind the counter, and his partner had him held up there; and he left us then, the defendant did, and made the clerk go up and open the money drawers. And he went up in behind the counter there and opened up the drawers for him, and started to go back out, crowd past him, and he said, "Climb over that counter there; I don't want you so close to me." And the clerk climbed over the counter, and stood there in line with the rest of us, and he taken the money out of the cash register in the drawer there, and came out there and marched us all out to the front, and they started to leave. His partner had got his horses by the front, and they started to leave, and he asked us if we had any cartridges there, and we told him we had. And he says, "One of you go back there with me and get me some," and didn't any one of us make any move, and he turned around to my father, and he

says, "Go back in there, old man; I would just as soon kill you as not." And he said, "You go back in there with me." And my father was kind of old, and told him he did not understand the cartridges very well, so he got the clerk to go back with him, and we didn't have any to fit him. He had an extraordinary big gun, and we had nothing to fit his gun; and so they came back out, got on their horses, and rode off.

Q. What direction did they go?

A. They went southwest.

30 Q. Lenapah is on the K. & A. V. R. R., is it not?

A. Yes, sir; it is 12 miles south of Coffeyville, Kansas.

Q. How far south of Lenapah is Nowata?

A. Twelve miles; that is, on the railroad.

Q. That, you say, was about 1 o'clock in the day?

A. I expect they must have got there about half-past 12 and left at 1. They were there quite awhile. We had all eat dinner but this clerk that I speak of. We always had dinner promptly at 12, so it was probably half-past 12 when they got there.

Q. What direction did they appear to come from when they came up?

A. They came from the south, the first we noticed of them.

Q. Is your store on the west side of the railroad?

A. No, sir; it is on the east side. It faces the west.

Q. *Said* the door out of which he shot faces to the south, did it?

A. It faces to the north.

Q. And the house in which Melton was killed was on the north side?

A. Yes, sir; across about two lots.

Q. Whose house was that?

A. It belonged to a fellow. It was Mr. Wells's house, but a fellow named Riley was running the business there.

Q. Were either of these parties masked in any way?

A. No, sir; they were not.

Q. Had you ever seen the defendant before that?

A. No, sir; not that I know of.

Q. Do you know the size of his gun?

A. The cartridges that we picked up there was 4590. The cartridge that he killed that man with I saw him throw the shell out of his gun.

Q. When he made the shot what did he do with his gun?

31 A. When he pulled up his gun and made that shot, when he shot out of the door, it knocked all the glass out of the door there about three feet square, and he pulled his gun up like he aimed to shoot the second time, and he didn't do it, and he went on with the clerk, as I spoke about. He made him open the drawers. Took the gun from that shot on to the clerk and made him open the drawers.

Q. When was this?

A. It was on the 9th of November, 1894.

Q. You recognize the defendant as one of the men that was there and the man who did the shooting?

A. Yes, sir; he sure was one of the men.

Cross-examination by Mr. J. WARREN REED:

Q. What time of day was it?

A. It was between half-past 12 and 1 o'clock, sometime. They were there between that time, I expect.

Q Just describe this building, and the location there. Which way does the railroad run there?

A. It goes nearly north and south. It varies a little, but not enough to speak of.

Q. As to the railroad, which way does your store stand?

A. My store faces the railroad, sets east and west.

Q. I suppose the store is a long building, and has a front end towards the railroad?

A. Yes, sir.

Q. And on the east side of the railroad?

A. Yes, sir.

Q. How far from the railroad is the front end of the building?

A. It is just three hundred feet, I believe. I believe it is 200 feet of right of way, and there is a street there.

32 Q. You speak of a middle side door there?

A. Yes, sir.

Q. Did that open towards the street?

A. No, sir.

Q. I mean towards the side street?

A. No, sir; our building is on the corner, street on the south and street on the west, and that door opened out into the yard. We have a quarter of a block fenced in there for the store, and the rest of it, what the store does not cover, is a yard, and there is a door facing into the yard.

Q. So the door where the shooting was done through opened into the yard?

A. Yes, sir.

Q. Then that door would look east, would it not?

A. It would look north. It is on the north side of the building.

Q. The railroad is north and south?

A. Yes, sir.

Q. That is putting your building standing fronting towards the railroad there?

A. Yes, sir.

Q. That would put it to your right——

A. The railroad runs this way [indicating], and the store sets that way [indicating], and the door he shot out of is a double door on the side of the building.

Mr. THOMAS H. BARNES (of counsel for defendant). Where was this window?

A. On the south side of the building that this man was in.

Q. How far from that door?

A. I believe it is 130 feet or right close to it.

Q. Whose store was that in?

A. It was Mr. Riley's store or restaurant, rather.

Q. Where were you standing when you saw the shooting?

A. I was standing right close to him. Not more than three

33 feet. Hardly that I don't think.

Mr. J. WARREN REED (of counsel for defendant). You stated something about the size of the gun that the man had that did the shooting; what was that?

A. The size of the cartridge that he throwed out was a 4590.

Q. Did you see them?
A. Yes, sir; I saw him throw it out.
Q. Was the cartridge found there afterwards?
A. Yes, sir; right where he throwed it out of the gun.
Q. Then the man that done the shooting had 4590 cartridges?
A. Yes, sir.
Q. And you know that from having found the cartridge where it was thrown out?
A. Yes, sir.
Q. Where is that cartridge; who has it?
A. Mr. Melton has it, I believe—a brother of the fellow that got killed.
Q. Where is he?
A. He is out here in the hall.
Q. How many shots were fired there altogether?
A. I think there must have been probably ten.
Q. How many hulls were picked up there?
A. I don't know; there was a good many. The defendant there only fired one shot. His partner seemed to be doing all the shooting, or did it all.
Q. That is all the shot he fired at all, was it?
A. That is all I seen him fire.
Q. Who fired the other shots?
A. His partner that was with him.
Q. Where was his partner?
A. When he killed this man his partner was looking around in the store there like he was hunting—he went around where the glove stock was, and hunted around there, and didn't find any to suit him.
34 Q. How far would he have been from the man that fired the shot?
A. I think he was outside when the shot was fired, or had just went out.
Q. Had gone through the door where you say the shooting was?
A. No, sir; he went out of the front door.
Q. Where did he go to?
A. He went out in the street and shot up and down the street, shooting at dogs or anything. I believe he shot a dog there.
Q. Did he stay outside?
A. Yes, sir; staid out there the rest of the time.
Q. Did you find his cartridges?
A. I didn't find any. I think the boys picked up some around there.
Q. Are any of them here?
A. I don't think there is.
Q. What size were they?
A. 3856, his gun was.
Q. Where were they picked up?
A. Right in front of the store where he was standing shooting.
Q. The man who had the 38 gun you don't claim to have been this defendant?
A. No, sir; it was a different man altogether.
Q. Did you get the ball that went through the man's head?
A. I didn't get it; it is here, though.

Q. The man that was outside wasn't this defendant, but was a different man?

A. He didn't look any more like him than you do.

Q. He was a small man, was he?

A. Yes, sir.

Q. What would he have weighed?

A. I don't think he would have weighed over 140, or hardly that much. He was a small looking man.

Q. He was an Indian, was he not?

A. No, sir; I do n't think he was. He didn't look like one.

35 He may be one. He didn't show it, though, much.

Q. What d'd he look like, then?

A. He looked like a white boy or white man, to me.

Q. Give his age, and looks, complexion, and size.

A. He was a light-complected man; looked to be about 20 years old; 19 or 20; small, light fellow.

Q. Did he have any beard?

A. I think he had a slight mustache; very slight, though; hardly noticeable.

Q. Long hair or short hair?

A. I didn't notice his hair; it wasn't long, I know; it was probably like mine.

Q. What color?

A. Well, I could not tell you about the color of his hair; I didn't notice that part of it.

Q. What color was his mustache? Black, wasn't it?

A. No, sir; it was a light mustache; it wasn't a heavy mustache at all, as I said awhile ago.

Q. Was it a light mustache?

A. Yes, sir; hardly noticeable only when you were close to it.

Q. Had you ever seen that man before?

A. No, sir; I hadn't seen either one of them before.

Q. What color was his eyes?

A. I could not tell you.

Q. You saw him pretty well, I suppose?

A. Yes, sir; he took my watch. He was that close to me; he took my watch and chain.

The ASSISTANT DISTRICT ATTORNEY. That was the white man that took the watch?

A. Yes, sir; the small one.

Mr. J. WARREN REED (of counsel for defendant). Wasn't he an Indian man?

A. No, sir; I don't think he was an Indian.

Q. You class him as a white man, do you?

A. Yes, sir; from his appearance.

36 Q. What kind of a hat did he have on?

A. To the best of my recollection he had a white hat on.

Q. Small man, with a white hat?

A. Yes, sir.

Q. What size white hat?

A. It wasn't very large; probably the brim was three inches wide, or four.

Q. What you would call about a medium size hat, like that one hanging over yonder [referring to a juror's hat]?

A. Yes, sir; something like that.

Q. You would call that a pretty large white hat, wouldn't you?

A. There are lots of them larger than that.

Q. Was it an old hat or a new one?

A. It had been worn a good while; I say it was an old hat; I didn't notice his hat much.

Q. What kind of a coat did he have on?

A. I didn't notice his clothes much; I think he had on a dark suit all over; that is my recollection.

Q. I am speaking about the small man now; what you call the white man; what was his coat?

A. I say I didn't notice his clothes much; I think it was all a dark suit.

Q. Ducking suit?

A. No, sir; I don't think it was.

Q. Are you not mistaken? Haven't you always claimed that both of these men had ducking clothes on?

A. No, sir; I always claimed that the defendant did.

Q. But describe the other man's coat.

A. I could not describe it any more than it was a dark-colored coat.

Q. Long or short?

A. It was what you would call a short coat.

Q. The small man, you say, had on a brown coat, did you call it?

A. No, sir; it was what we would call a sack coat.

37 Q. I speak as to the color of it?

A. I could not tell you about the color of it more than it was dark. I noticed his clothes were dark color.

Q. Is that the best description you can give of that coat?

A. Yes, sir. He had on high top boots, and his pants inside of his boots.

Q. Was the coat buttoned up or open?

A. I don't think it was buttoned, but he had a belt around the outside of it.

Q. It wasn't buttoned?

A. No, sir; I don't think it was.

Q. How many belts did he have on?

A. I don't think he had on but one. There may have been one under his coat, but I didn't see it.

Q. What kind of pantaloons did he have on?

A. I could not describe them any more than I can the coat.

Q. Were they white?

A. No, sir.

Q. Brown, green, or what?

A. No, sir. I told you awhile ago his whole suit was dark.

Q. Were they overhauls stuff?

A. No; I don't think they were.

Q. Were they cloth?

A. Yes, sir: I believe so.
Q. What did he wear on his feet?
A. He had on a pair of high top boots—shop-made boots.
Q. That is a boot very commonly worn, is it not?
A. Yes, sir; lots of the boys wear them up there.
Q. How was he armed? Did he have a pistol as well as a gun?
A. The Winchester is all the arms I noticed on him.
Q. Did he have any pistol?
A. I didn't see any.
Q. There was cartridges in that belt, I suppose?
38 A. Yes, sir; he had it full.
Q. Now, describe the other man that was there. Was he wearing any beard?
A. No, sir; he wasn't.
Q. How much would he weigh? Don't look at this man now.
A. I think the man that was there would weigh 160 or 170 pounds; maybe 175. I would say 170.
Q. What color eyes did he have?
A. I didn't notice his eyes particularly.
Q. What was his complexion?
A. He had what I would call a mullatto complexion, or mulatto color.
Q. There are a great many Indians of that color, isn't there?
Why, yes. You will find Indians all shades.
Q. Did he have long arms or short arms—his weapons?
A. It was just an ordinary length Winchester.
Q. Had he a pistol?
A. I didn't see any, if he did.
Q. What kind of a hat did he have on?
A. He had on a black hat.
Q. What size?
A. It was about the size of that white hat there; probably a little larger [pointing to one of the juror's hats].
Q. Was it a hat like this [referring to the defendant's hat]?
A. Something similar to that.
Q. It might have been the same hat. Might it not?
A. It could have been the same hat, I expect. It was something like that.
Q. From general appearance you say it was a hat like that?
A. Yes, sir.
Q. What kind of a coat did he have on? I believe you stated though, he had a ducking coat on?
A. Yes, sir.
39 Q. Was that a long or short coat?
A. A ducking coat is not a very long coat. I don't think they make any different lengths in those. It was a short ducking coat.
Q. What kind of pants did he have on?
A. I didn't notice his pants so much, but to the best of my recollection they were dark color.
Q. How did he wear them?
A. He had them inside of his boots.
Q. What kind of boots did he have on?

A. Same as the other; shope-made boots with high heels and high tops.

Q. You saw, I suppose, what kind of horses they had

A. Yes, sir; I didn't notice their horses very particularly, but I saw them.

Q. You saw them come and ride off?

A. Yes, sir.

Q. Describe the horses in a general way the best you can.

A. One horse was a dark bay, pony like; it wasn't very large. They were not either one of them very large horses.

Q. Which man rode that pony?

A. I could not say.

Q. Was there a saddle on it, or was he riding it barebacked?

A. Both had saddles.

Q. What kind of a saddle on that pony?

A. I could not describe the saddle at all.

Q. Did they have bridles and halters?

A. They had saddle and bridles on.

Q. What kind of bridles?

A. I could not tell.

Q. Did they have scabbards to carry their guns in, or anything like that?

A. No, sir; I don't think they had; I didn't notice any. They might have had them under their saddles and took them out when they rode off.

Q. Describe the other horse.

A. The other horse was rather a mean color to describe. I thought to the best of my recollection it was a light bay or light sorrel; I could not say which. It was a light-colored animal, bald faced.

Q. Was it a large or small horse?

A. I think it was a little bit larger than the other one; the largest horse of the two.

Q. Which horse did that man belong to?

A. I could not say which one that the horse belonged to.

Q. You saw him riding it off, did you?

A. Yes, sir; but I don't recollect which one got on it.

Q. Did he have saddle on?

A. Yes, sir.

Q. Describe the saddle and bridle of that horse.

A. I could not no more than I did the other. The saddle and bridle is all I know of.

Q. Did the bay horse have any white about it?

A. I don't think it did. If it did I didn't notice it.

Q. How long were they there?

A. They must have been there 20 or 30 minutes, or something like that. They seemed to be in no hurry.

Q. At the time they were there who was about that store?

A. My father was there, and there was one clerk there a part of the time.

Q. What clerk?

A. A fellow by the name of Bell was there.

Q. Is Bell here?

A. No, sir; he is in Peoria, Illinois.
Q. What is his first name?
A. William.
Q. Who else was in the store?
A. There was several there. A fellow by the name of Levy Smith.
Q. When they were there where was he?
41 A. When they came in he was back there getting some door hinges to put on my house. They got him lined up with the rest of them in a few minutes.
Q. Who else was there?
A. A boy by the name of Harry Clark.
Q. Who else?
A. There was a man on the scales with a load of wheat by the name of Clem Harter.
Q. That was all there was in the house?
A. No, sir; there was a lady in there named Mrs. John Groves.
Q. Where was Clark at the time this was going on?
A. Him and this man Smith were standing in there in front of the counter with the rest of them.
Q. Which counter?
A. The counter that is on the north side of the store.
Q. They both stood there together, did they?
A. Yes, sir; they stood side by side, I think.
Q. All the time while it was going on?
A. Yes, sir; until they marched us out in front.
Q. You were lined up, too, were you?
A. After we came back from the office I stood there at the end of that counter like.
Q. Where is the office located?
A. In the rear end of the building in the center. There is three rooms in the back end of the building, and the center one is the office.
Q. There was nobody in the office but the man that robbed you, you and your father?
A. Yes, sir.
Q. The others were out in another part of the store?
A. Yes, sir.
Q. The office is an enclosed place in there, is it not?
A. Yes, sir; it is a room to itself.
Q. So a person that was out in the store could not see what was going on in the office?
42 A. No, sir; they could not tell what they were doing in the office.
Q. How long was the man that robbed you in the office?
A. We were not in there long. About three or four or five minutes. It took him quite a bit. He had a little trouble in getting the money in his pocket. He had a belt around over his pocket, and after he got the money in his fist it took him quite a little bit to get his pocket open so he could get it in.
Q. After that was done he came out and left?
A. No, sir; he came out and shot that man out of the door.
Q. And then left?

A. No, sir; he didn't leave yet.

Q. You say there was a lady there. Where was she?

A. She was setting on the south side of the store, I think, when they first came in. I know she was there.

Q. Is that lady here?

Q. Yes, sir.

Q. You have told us which way these men went when they left?

A. Yes, sir; I saw them for a mile or two after they left—two miles.

Q. Of course, after the robbery was over there was quite a number of people came in and made inquiry, wasn't there?

A. There wasn't so many came there as there was over to where the man was shot. Most of them congregated up there. A few came in the store.

Q. You have told us of all the persons in the store, and you have told us of one man about the scales. There may have been more there, but there was none others there that you saw?

A. No, sir; not that I recollect of.

Q. Who was the man at the scales?

A. Clem Harter.

The COURT. Was Earnest Melton a white man?

A. Yes, sir; he was painting my house at the time.

43 Mr. J. WARREN REED (of counsel for defendant). Now, in describing these men who had robbed you there after it was over, didn't you describe them as a white man and an Indian, on that same day?

A. I told them I took one of them to be a Creek negro. That is all I told them about it.

Q. Didn't you tell Mr. Roacj and Mr. Vanmeter, and several others, after this robbery was over, that one of the men who robbed you was a white man and the other was an Indian, and that the Indian was the small man, the smallest of the two?

A. No, sir.

Q. You know Roach and Vanmeter?

A. Yes, sir.

Q. They live there, don't they?

A. Mr. Vanmeter works there in town. Roach lives close to town, in five or six miles.

Q. Do you remember of seeing them there that day or next day?

A. Yes, sir.

Q. Do you remember Mr. George Vann, a colored man?

A. Yes, sir.

Q. Did you describe the men to him?

A. No, sir.

Q. And say to him that one was a white man and the other was an Indian, and that the Indian was the smallest one of the two?

A. No, sir.

Q. And the same way to Mr. Swoop?

A. No, sir.

Q. You know him, don't you?

A. Yes, sir.

Q. And to Merril, the same way?

A. No, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY.

Q. At the time your watch was taken was there a charm also
44 taken?

A. Yes, sir; charm taken, and all.

Q. Have you seen that charm since?

A. Yes, sir.

Q. Have you with you now that charm?

A. Yes, sir.

Q. I wish you would let me have it?

A. Here it is. [Witness produces a charm.]

Q. That is the charm that was taken at the same time your watch was?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. I will not introduce the charm until it is identified by other parties.

A JUROR. I believe you stated you recognized this defendant as being the man that done the shooting—that is, the killing of that man?

A. Yes, sir.

Q. Was there any peculiar feature you saw about that man, and the one you see here now, in his general appearance?

A. Nothing only his general appearance, and what I call a mean look in the man.

Q. I didn't know but what there was some particular feature that you noticed in that man?

A. No, sir; just his general appearance.

Mr. THOMAS H. BARNES (of counsel for defendant). His general appearance and mean look. He is the only mean looking man that you ever saw?

A. He is about as mean a looking man as I ever saw; yes, sir.

At this point a recess was taken until 1.30 p. m.

AFTERNOON SESSION.

The ASSISTANT DISTRICT ATTORNEY. Do you know how much money about these parties obtained?

45 A. I can give a very close account. It was between 125 and $140.00.

The COURT. Did you prove the details of the robbery, that it was done against his will?

The ASSISTANT DISTRICT ATTORNEY. Yes, but I didn't go into that in detail.

The COURT. I think you ought to do that. It would be competent to do that to show a killing done in the course of a robbery.

The ASSISTANT DISTRICT ATTORNY. State why the money was parted with.

A. In fear of my life. He swore he would kill us if we didn't turn the money over to him.

Q. You parted with it for the reason and under the circumstances you have detailed here this morning?

A. Yes, sir. What I said about the amount of money was out of the post-office and store both.

Q. What kind of money was it?

A. Well, about the only bill I remember about personally was one 50-dollar bill that was taken in the day before—a silver certificate.

Q. Money of the United States?

A. Yes, sir; and the rest was in smaller bills. And there was considerable silver; half dollars, and dollars, and quarters.

Q. Silver money of the United States?

A. Yes, sir.

Q. Were there any smaller bills than the fifty-dollar bill?

A. Yes, sir; there was some tens and fives.

Q. What kind of money were they?

A. I could not say; it was United States money.

46 Recross-examination by Mr. J. WARREN REED:

Q. When was the next time after this robbery that you saw the man you supposed robbed you?

A. I never saw him until I came down here on the 6th of this month.

Q. You saw him first here in the court-house, didn't you?

A. Yes, sir; he was in here when I came in.

Q. He was sitting here on the prisoner's chair when you came in?

A. Yes, sir; I suppose he was here a prisoner.

Q. Are you acquainted with the various bands of robbers that range over that country up there?

A. No, sir; I don't know that I know any of them.

Q. Do you know Bill Cook?

A. No, sir; I know him when I see him.

Q. Did you know Skeeter?

A. No, sir; never saw him that I know of.

Q. Did you know Curtis Dason?

A. No, sir.

Q. Jim Lucas?

A. No, sir.

Q. Jim Turner?

A. No, sir.

Sam Brown?

A. No, sir.

Q. Perry Brown?

A. No, sir.

Q. Sam McWilliams?

A. No, sir.

Q. Bill Doolin?

A. No, sir.

Q. Tulsa Jack?

A. No, sir.

Q. Jim French?

A. No, sir.

Q. Slaughter Kid, as they call him?

A. No, sir.

Q. Bitter Creek?

A. No, sir.

47 Q. Joe Booker?

A. No, sir.

Q. You don't know any of them?

A. No, sir; I don't know any outlaws. I don't have any such acquaintances.

Q. Were you ever robbed before?

A. Yes, sir.

Q. How long before?

A. It has been two or three years ago; something like that.

The ASSISTANT DISTRICT ATTORNEY. That was by Henry Starr and Creekmore?

The WITNESS. Yes, sir; Milo Creekmore and Henry Starr.

(Witness excused.)

48 W. S. MELTON, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Q. Where do you live?

Answer. Paris, Texas.

Q. You knew Earnest Metlon?

A. Yes, sir.

Q. What akin was he to you?

A. Brother.

Q. Where were you living at the time he was killed?

A. Paris, Texas.

Q. Did you go after him in the Territory?

A. Yes, sir.

Q. He was a white man, not a citizen of the Indian country?

A. Yes, sir.

Q. Have you the shells and balls that were turned over to you as the ones picked up there at that place?

A. Yes, sir.

Q. Let us see them, please.

(Witness produces balls, etc.)

Q. This one appears to have no powder in it.

A. I split it and took it out for fear it might go off accidentally.

Q. Who delivered these to you?

A. Clark, as well as I remember.

Q. The witness that is he'e?

A. Yes, sir; Harry Clark.

(The two shells produced by witness and identified by him introduced in evidence.)

Q. You know nothing about the facts of the robbery and killing there yourself, do you?

A. No, sir.

Q. Your brother was a white man?

A. Yes, sir.

Q. What age was he?

A. Twenty years old; he would have been 21 in April—April 26, 1895.

Q. What was he doing up in that country?

49 A. He was a painter and paper hanger by trade, and he hired to go to Lenapah and do some work, I think.

Q. Did your brother live in Paris, Texas, before he went up there?

A. Yes, sir. I call Paris, Texas, my home, but I am a railroad man, and I run between Ft. Smith and Paris.

Cross-examination by Mr. THOMAS H. BARNES:

Q. Do you know the date of the killing?

A. Yes, sir; on the 9th of November.

Q. How do you know that?

A. Because of the clearance I got on that date, and by the message I got, and leave of absence, which was dated on the 9th, and I laid off ten days when I went up there.

Q. You got a telegram, I suppose?

A. Yes, sir; I got a message upon my arrival in Ft. Smith, about 2.20 p. m.

Q. You got here that night?

A. I got here about 2.10 p. m. and got a telegram about 2.20 p. m.

Q. Stating your brother had been killed that day?

A. Yes, sir.

(Witness excused.)

50 HARRY CLARKE, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. Live at Lenapah, Indian Territory.

Q. Were you there on the day of the robbery?

A. Yes, sir.

Q. Where were you when the men first came up?

A. I was in the front part of the store of Schufeldt's.

Q. Did you see the men?

A. Yes, sir.

Q. Have you seen any of them since?

A. Yes, sir; one of them.

Q. Is he here now?

A. Yes, sir.

Q. Where is he?

A. The defendant there.

Q. You were in the store when they came in, were you?

A. Yes, sir.

Q. How long did you stay there then?

A. I staid in there all the time.

Q. Why didn't you go out?

A. I could not.

Q. They held you, did they?

A. Yes, sir.

Q. Just go on and tell what you know about it; tell all about the robbery and how it occurred.

A. Well, I was standing in the front part of the store when they come in, and they came in and told us to throw up our hands, and run us right back in the back part of the store, or about middle way of the store, and made us stand there until it was through with.

Q. Did they get anything from you?

A. No, sir.

Q. Did you see them get anything from Mr. John Schufeldt?

A. Yes, sir.

51 Q. Anything from his person?

A. No, sir.

Q. Did you see them get any money from the house?

A. Yes, sir.

Q. Did you see the defendant at the time the shot was fired which killed Melton?

A. Yes, sir.

Q. Is this defendant the man who fired that shot?

A. Yes, sir.

Q. Where were you standing at the time the shot was fired?

A. I was standing about 8 or 9 feet from him, right out along the counter.

Q. Was he masked in any way?

A. No, sir.

Q. Do you remember the day of the month that was on?

A. Yes, sir; it was the 9th of November.

Q. Did you see Melton at the time the shot was fired?

A. No, sir.

Cross-examination by Mr. J. WARREN REED:

Q. What day of the week was it?

A. Friday.

The ASSISTANT DISTRICT ATTORNEY. Did you pick up any shells or cartridges around there?

A. Yes, sir.

Q. What did you do with them?

A. I give them—one of them to Mr. Melton here, and I don't recollect who I did give the others to now.

Q. Do you remember what number they were—the one you gave to Mr. Melton?

A. Yes, sir; it was a 4590.

Mr. J. WARREN REED (of counsel for defendant). All you picked up were one size, or were they two sizes?

A. Two sizes.

Q. What was the other size?

A. 3856.

52 Q. Where did you pick up the 4590?

A. I picked up one of them back in the building where he was shooting. I picked up some out in the street.

Q. The ones that were in the street were the shells from the man that stood outside?

A. Some of them were.

Q. The shell that was found inside was from the man that was inside?

A. Yes, sir.

Q. The man that stood outside never shot from the inside of the building at all, did he?

A. No, sir.

Q. Where did you say you were when they first came?

A. I was in the front part of the store.

Q. How long had you been there?
A. I had been in there I guess about an hour or two.
Q. What were you doing?
A. Just come up just to be around town.
Q. Where did you live?
A. About a mile and a half south of town.
Q. Do you trade in Schufeldt's store?
A. Yes, sir.
Q. How long have you been trading there?
A. About three or four years.
Q. You done all your trading with him?
A. Yes, sir; most of it.
Q. You are good friends, are you?
A. Tolerable.
Q. Where were you at the time of this shooting?
A. I was back about middle ways of the building.
Q. How far would that be from the front of the building?
A. It would be about 25 feet, I should judge.
Q. You were in there all the time while this was going on?
53 A. Yes, sir.
Q. How long was it?
A. It was about five or ten minutes, I reckon.
Q. They got through with the robbing and was gone in five or ten minutes?
A. Yes, sir.
Q. You state this was on Friday?
A. Yes, sir.
Q. Did you see the man that stood outside?
A. Yes, sir.
Q. What size man was he?
A. About five feet and a half.
Q. What was his weight?
A. About 150 pounds, I presume.
Q. Wasn't he a small man?
A. He was rather small. Pretty heavy built.
Q. He was an Indian, was he not?
A. I could not tell whether he was an Indian or not.
Q. Could you not say that he was an Indian looking man?
A. Well, he looked something like an Indian; kind of yellow.
Q. What color hair did he have?
A. I don't recollect.
Q. Did he have any beard on his face?
A. He had a little mustache.
Q. What color was that?
A. It was kind of a brown, I guess.
Q. Wasn't it black?
A. Brown, or dark brown; it may have been black.
Q. Wasn't it a black mustache?
A. I could not say whether it was or not.
Q. Was it long or short?
A. Medium length.

Q. Could you not see his hair?
A. I never noticed his hair.
Q. You would call him an Indian looking man?
A. Yes, sir.
Q. Did he look like a full-blood Indian or a half-breed?
A. He looked like he was about a quarter-breed.
Q. Wasn't there more Indian than that in him?
54 A. I could not *not* tell as to that.
Q. What kind of a hat did he wear?
A. It was a brown or black hat.
Q. What kind of a coat?
A. It was a brown ducking coat.
Q. Long or short?
A. It was pretty long; medium length.
Q. What size hat did he wear; large hat?
A. Yes, sir; pretty large.
Q. Was it as large as this hat [referring to defendant's hat]?
A. Yes, sir; something about the size of that hat.
Q. Did he have any cartridge belt about him?
A. Yes, sir.
Q. Around under his clothes here? Could you see it?
A. No, sir; it was on the outside.
Q. One belt?
A. Yes, sir.
Q. What kind of pantaloons did he have on?
A. I don't remember.
Q. Did he have on boots or shoes?
A. I don't remember.
Q. Did you see their horses?
A. Yes, sir.
Q. Did either of them have a bald face?
A. I think one of them had a bald face.
Q. You can't remember any other description of them, can you?
A. No, sir; only as to their colors.
Q. Now, when these men rode up there, and you learned they were there for the purpose of robbing, the people scattered, did they not?
A. Yes, sir.
Q. There was nobody left there at the store but you and the clerk and the two Schufeldts, was there?
A. Why, yes; there was a man named Smith.
Q. Didn't Bell and Wakefield come there after the shooting?
55 A. Mr. Bell came immediately afterwards
Q. And what about Wakefield?
A. He hid out back—out by the cornerib.
Q. Could you see Bell come up after the shooting?
A. He came up just a little while after the shooting, I believe.
Q. Isn't it a fact that just at the time of the shooting, at the time they were in there, the first shot, that there was nobody in there but you and the two Schufeldts, and that that was all?
A. There was a man named Smith in there, and there was a woman in there. I believe that is all that was in there then.

Q. Are you sure that Smith was in there?
A. Yes, sir.
Q. Old man Schufeldt was in the back part of the house, was he not?
A. He was behind the counter, I believe, or right around the counter there somewheres.
Q. Where did Bell come from?
A. He came from up overhead?
Q. He came down out of the top of the building?
A. Yes, sir.
Q. Upstairs?
A. Yes, sir.
Q. Now describe the other man that was there doing the robbing. Don't look at this defendant?
A. He was a large, heavy set man, broad shoulders.
Q. What would he weigh, 200?
A. About 160 or 175.
Q. Had on a large black hat, did he not?
A. Yes, sir; pretty large.
Q. A hat like this one [referring to the defendant's hat]?
A. Something like that one.
Q. Looked just like that one?
A. Well, it was a black hat with a large rim, something like that one?
Q. He was a pretty fat man, was he not?
56 A. He wasn't such a fat man. He was heavy built—large built.
Q. What *m*ind of a coat did he have on?
A. Ducking coat; brown.
Q. Both had the same kind of coats?
A. Yes, sir.
Q. Did he have a gun?
A. Yes, sir.
Q. Did he have a pistol?
A. Yes, sir.
Q. Did they both have pistols?
A. Yes, sir.
Q. Where did they have them?
A. In their belts.
Q. Each man had his pistol outside on his belt?
A. Yes, sir.
Q. You hadn't seen either of these men before, had you?
A. No, sir.
Q. Nor since, unless you think this is one of them?
A. No, sir.
Q. After that where did you first see this man?
A. In the court room here.
Q. As a prisoner?
A. Yes, sir.
Q. In the prisoner's box—on the prisoner's chair?
A. Yes, sir.
Q. He was called Cherokee Bill here, wasn't he?
A. Yes, sir.

Q. How long have you lived up in that country?
A. About four years; pretty near five.
Q. In talking around there after this robbery didn't you have inquir'es from a number of men to describe these men?
A. No, sir.
Q. You never did?
A. No, sir.
Q. Didn't you describe one of them as a white man and the other as an Indian?
A. No, sir; not as I recollect of.
Q. Were you acquainted with the different bands of robbers up in that country?
A. No, sir.
57 Q. Did you know Bill Cook?
A. No, sir.
Q. Nor Skeeter?
A. No, sir.
Q. Curtis Dasin?
A. No, sir.
Q. Jim Lucas?
A. No, sir.
Q. Jim Turner?
A. No, sir.
Q. Jim Frnech?
A. No, sir.
Q. Sam Brown?
A. No, sir.
Q. Perry Brown?
A. No, sir.
Q. Sam McWilliams?
A. I never knew him; no.
Q. Bill Doolin?
A. No, sir.
Q. Tulsa Jack?
A. No, sir.
Q. Slaughter Kid?
A. No, sir.
Q. Joe Booker?
A. No, sir.
Q. Bitter Creek?
A. No, sir.
Q. You hadn't seen any of these men?
A. No, sir.
Q. You don't know but what these were some of these men?
A. No, sir; I don't know what they were.
Q. It might have been some of the men I have mentioned and you not know it?
A. Not at that time; I didn't know who it was.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You didn't see as much of the man on the outside as you did this one, did you?

A. I saw him when he came in the store.
Q. But you were closer to this one [referring to the defendant]?
A. Yes, sir.
Q. Did you follow them any after they started off?
A. No, sir.
(Witness excused.)

58 LEVI SMITH, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. Four miles south of Lenapah.
Q. Are you a citizen of that country?
A. No, sir.
Q. Were you in Lenapah on the day of the robbery of Schufeldt's store last fall?
A. I was.
Q. Were you in that store?
A. Yes, sir.
Q. Where were you when you first saw the robbers come up?
A. After I came out from my dinner I went into the store, went around the back end of the store where the hardware is located. I went there to pick out some door trimmings, as I was building a new house. While I was back there picking them out some fellow run up to me with a Winchester, and he says, "Get back out of the way; there is liable to be some shooting down here." That was the small man. I didn't know his name. I turned then and walked back, and as I walked back I saw Cherokee Bill come through with Mr. Schufeldt, and John Schufeldt following behind, towards the office.
Q. That was this defendant here?
A. Yes, sir.
Q. Tell what occurred then.
A. I went back past where the north entrance is to the store, and there I stopped. There I met this Harry Clark; he was coming in from the ot'er way. He backed us up against the counter there and made us hold our hands up. We stood there some little time while they were operating in the office. And Mr. Bell came in, one of the clerks, at the north
59 door, and this French, or Williams, or whatever his name was, he says, "Hold up your hands," and Bell hadn't got on to the racket yet, and says, "Oh, shaw; that is getting old."
Q. Bell says that?
A. Yes, sir. And he put the Winchester right down on him, and he says, "You had better hold up your hands or you are a dead man," and Bell saw the necessity of it, and held up his hands. That made three of us right there together. On the dry goods side of the store was Mrs. Groves, a lady, and this French, or Williams, whoever he was, he was exercising himself around, and kept watching out of the front door and out of the north side, and looked after the horses.
Q. Did he fire any while he was doing that?
A. No, sir; not while he was there then. And after Cherokee Bill came out of the office—he came out of the office—the office is located right

in the center of the store—and he came out and came right up the alley, and as he came up the alley he looked out of the north door, and he saw something there he didn't like, and he pulled his gun right up and fired. He reloaded his gun and looked a second, and then went around behind the counter. He went along a little past the counter. As he went along past me Bell jumped over the counter, and he says to Bell, then he says, "Come back and open up this register," and he got back and opened up the register, and he took what money there was then, and put it in his pocket, and then he went forward where the post-office till was, and he says, "Open this up," and Bell opened that up for him, and he took what money there was there, and he looked around there then a little bit, but he didn't disturb anything that I know of. He came out, and as
60 he came out Mr. Schufeldt and John and Clark and myself all stood along there in a row, and he said, "Now, gentlemen, I want your watches."

Q. Was that Cherokee Bill?

A. Yes, sir; and didn't one of us happen to have any but Mr. Schufeldt, and he took his watch out and he says, "Do you call that a gold watch," Cherokee Bill says, "or is it silver?" and he says, "Hardly that;" and he says, "No; I don't want that," and then he marched us out to the front of the building, out on the scales and platform. While we were out there Cherokee Bill fired at a dog, and the dog made some fuss and run, and he fired at him the second time. At this Mrs. Schufeldt appeared at a window overhead, with a child in her arms, and wanted to know what all that firing was, and someone told her they were holding up the store, and she screamed and fell back; and then Frank Schufeldt, a fellow about 16 years old, he appeared at a window up there, and this Jim French, or Williams, whatever his name was, fired a shot right up over the window; went through the corner of the room up there; and then Cherokee Bill called Schufeldt and Bell and Clark back in to see if he could get some am'unition for his gun. He went back in there, and I guess he did not find any, but I don't know about that; I wasn't in there at that time. He came out, and they got on their horses and rode away. When they got down to the railroad crossing they fired one shot back.

Q. When did you next see Cherokee Bill after that?

A. I saw him in the Ft. Smith jail here.

Q. State whether or not you picked him out over there.

A. Yes, sir; I picked him out; I had no trouble at all.

Q. You recognize this defendant as the man?

A. Yes, sir.

61 Cross-examination by Mr. J. WARREN REED:

Q. You were engaged with Schufeldt?

A. I was building a dwelling house for him.

Q. You were working for him?

A. Yes, sir.

Q. How long did you work for him?

A. I don't know just exactly how long.

Q. Was your home there in that town?

A. No, sir; I live four miles south of there.

Q. How long had you lived there?

A. Where I live now it will be four years in April.

Q. You didn't know either of these men that were there, I suppose?
A. I didn't know their names at that time.
Q. And you had never seen them before?
A. No, sir.

The ASSISTANT DISTRICT ATTORNEY. Did you see the watch taken from John Schufeldt?

A. No, sir; I did not; that was taken in the office.

Mr. J. WARREN REED (of counsel for defendant). You don't know that this is Cherokee Bill only from what people say?

A. I know the countenance all right.
Q. You knew nothing of the man's name at that time.
A. No, sir; I never had seen them before.
Q. Describe their maneuvers. Was one out there and the other inside, or were both inside, or both outside, or what?
A. Cherokee Bill was inside when he was doing the robbery and the other one was keeping guard. He was on the outside and inside, too. He made himself useful all around.
Q. Describe the man outside.
62 A. He was a little short fellow, and I should think he would weigh about 135 or 140 pounds, and I would guess he was about 18 or 19 years old, and maybe 20.
Q. An Indian or white man?
A. I don't think he was either one.
Q. He was an Indian-looking man, wasn't he?
A. He didn't look exactly like a full-blooded white man.
Q. Wasn't he an Indian-looking man?
A. I can't say that I think there was much Indian blood in him.
Q. Was he a tall man or a medium-sized man?
A. He was a short man.
Q. Have black hair, did he?
A. Dark hair.
Q. Long beard or short beard?
A. He didn't have any beard.
Q. None at all?
A. No, sir.
Q. Was his hair long or short?
A. About medium.
Q. What color was his eyes?
A. I could not tell; I didn't see him close enough to know.
Q. What kind of a hat did he wear?
A. I think he had on a dark-colored hat. I don't think it was exactly black.
Q. Would you call it a brown-black hat?
A. Yes, sir.
Q. Was it large or small?
A. Good size. The rim was pretty wide.
Q. What kind of a coat did he wear?
A. I think he had on a jeans coat.
Q. Blue jeans?
A. I could not tell you exactly the color of it. I think it had been worn considerably.

Q. What we call a frock dress coat, was it, or frock long coat?
A. No, sir; short coat.
Q. Frock coat or sack coat?
A. I think it was a sack coat, but I am not sure.
63 Q. What kind of pants did he have on? Did he have on overalls?
A. I think he had on brownish pants. He had on high-top boot legs that came clear up to here, and his pants came inside of them.
Q. Did he have on blue overalls like his coat?
A. No, sir.
Q. What color were they?
A. I would think it was kind of a brown color—like brown jeans, or something of that kind.
Q. You are describing the man out doors now?
A. Yes, sir; the small man.
Q. Did he have any weapons?
A. He had a Winchester.
Q. Had he a pistol?
A. I could not tell you whether he had a pistol or not. If he did, he had it under his coat.
Q. You saw no belt, I suppose?
A. I saw a belt with some cartridges in it, but I didn't see any pistol strapped to it.
Q. Where did he have his belt?
A. Under his coat.
Q. Did he have on boots or shoes?
A. Boots.
Q. Now, describe the other man—the man that was inside. What would he weigh, 200, 250, or 180?
A. I should guess he would weigh 165. He might come, possibly, 170; somewheres in that neighborhood.
Q. What color was his hair?
A. Black.
Q. Long or short?
A. About medium length.
Q. What color was his eyes?
A. I could not tell.
Q. What kind of a hat did he have on?
A. Black hat.
Q. Large or small?
A. Pretty good size.
Q. About like the one lying here in front of the defendant?
A. Something si'lar to that.
Q. Same hat, wasn't it?
A. I could not say whether it is the same hat or not. I could not swear as to that.
64 Q. Was it black or brown?
A. Black.
Q. What kind of a coat did he have?
A. He had on dark-colored jeans coat, I think.
Q. Long or short?

A. It wasn't very long or very short.
Q. What kind of pants did he have on?
A. The pants had been wore some. I could not tell you exactly the color of them. Something similar to the coat. He had them inside of his boots.
Q. Were they made of jeans or broad cloth?
A. I could not tell you that.
Q. Was he a white man, or an Indian, or African, Jew, Gentile, or what was he?
A. It was pretty hard to tell.
Q. You can not tell whether he was a white man or an Indian?
A. I know he wasn't a white man.
Q. You don't know whether he was a Creek or Choctaw?
A. No, sir.
Q. Did they ride in town or walk?
A. They rode, I expect. I didn't see them when they came in town.
Q. You say the man inside didn't have any pistol that you saw?
A. I didn't see any.
Q. Did you see their horses?
A. Yes, sir; when they went away.
Q. Were they horses or mules, or both?
A. A little bay horse, weigh about 950 pounds, and one of them had a white stripe in the face, and the other white snip on the nose. One of them had one or two white feet.
Q. Which one had the white feet?
A. I think the one with the white stripe in the face had one or two white feet.
Q. You never were in a hold up before, were you?
A. No, sir.
Q. You were considerably excited, I reckon?
65 A. No, sir; not much; not any more than I am now.
Q. Perfectly cool?
A. Yes, sir; nothing to excite me particularly.
Q. Can you see very well?
A. Yes, sir; tolerable well.
Q. Do you use glasses?
A. Yes, sir.
Q. Did you have them on?
A. No, sir.
(Witness excused.)

66 JOHN A. SMITH, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. Lenapah, Cherokee Nation.
Q. Were you there on the day of the robbery last November?
A. Yes, sir.
Q. Where were you when the robbery first came up?
A. I was about ten yards from Schufeldt's store.
Q. What direction from the store?

A. South.
Q. Did you see the robbers before they got off their horses?
A. I saw them when they jumped off their horses.
Q. How far were you from them at that time?
A. About ten yards from them.
Q. What did they do when they jumped off their horses?
A. They run into Schufeldt's store.
Q. What did you do then?
A. I jumped off and walked up to the store.
Q. What was going on when you got down there?
A. When I came down there he shoved Mr. Schufeldt in the door of the store and went into the store.
Q. What did they do to you, if anything?
A. They didn't do anything to me.
Q. Did you go in the store?
A. No, sir; I didn't walk in the store.
Q. Did you stay on the outside?
A. Yes, sir; I walked to the door and staid there and seen what they were doing.
Q. You saw what went on, did you?
A. Yes, sir.
67 Q. Have you seen either one of those robbers since that time?
A. No, sir; not as I remember.
Q. Have you seen either one of them since you came here to court?
A. Yes, sir; I seen Cherokee Bill.
Q. Was he one of the men that was engaged in the robbery?
A. Yes, sir; he was the one that jumped off the horse first and shoved Mr. Schufeldt into the door with his Winchester.
Q. You know the defendant is that man?
A. Yes, sir; the other one jumped off at the same time.
Q. Did you take any notice of their guns, whether they were new or old guns?
A. No, sir.
A JUROR. In addressing each other did they call any names?
A. I can't tell. Cherokee Bill was talking with Schufeldt.
Q. When he called his partner did he call him by any name?
A. Not that I know of.
Q. Or his partner him?
A. No; I didn't hear him.

Cross-examination by Mr. J. WARREN REED:

Q. You stood outside of the store?
A. Yes, sir.
Q. And looked back in the store?
A. Yes, sir.
Q. I suppose after you saw what was going on there you went away, didn't you?
A. Yes, sir; I went away then.
Q. You went away when you saw this robbery going on?
A. I seen they had Schufeldt and John back there in the store——
Q. You were there on the street, and you just saw these men ride up; they rode up in a pretty good swift trot?

A. Yes, sir.

Q. Jumped off their horses, run up there, and jobbed old man
68 Schufeldt inside; one went then inside and the other stood at the door?

A. One walked in and then came out and guarded the door.

Q. When you found out there was a robbery going on there, of course you went away?

A. Yes, sir.

Q. Then you went over to the restaurant, across the street, where a man was shot?

A. Yes, sir; I went away.

Q. You just saw the man that was inside in that way?

A. Yes, sir.

Q. You didn't go in there at all?

A. No, sir.

Q. The man that stood outside was a small man, wasn't he?

A. Well, I went away. I didn't look at them at all.

Q. That man was a small man, wasn't he?

A. Yes, sir; he was smaller than Cherokee Bill.

Q. You saw the man that was dead over here in a coffin sometime ago, didn't you?

A. Yes, sir.

Q. The man they call Jim French?

A. Yes, sir.

Q. I want to know if in your best judgment it wasn't the same man?

A. I can't tell.

Q. He looked like him, didn't he? About the same size and about the same color?

A. I can't tell if it was this man.

Q. Did it look like him?

A. No; I could not tell if it just looked like him when he was up there.

Q. This man was shot, wasn't he, and laying in a coffin?

A. Yes, sir.

Q. And his face bloody?

A. Yes, sir; I could not tell if it was this man.

Q. Haven't you said that it was your best judgment and your best belief, that he was one of the men, the man that stood at the door?

69 A. I said he looked just the same way, but I could not tell if it was this man or not.

Q. But it looked like him?

A. Yes, sir; but I could not tell if it was this man.

Q. I am not asking you positively. I am asking you to give your judgment. He was about the same colored man, wasn't he?

A. Yes, sir; about the same color, as much as I know.

Q. The same color in the face?

A. Yes, sir.

Q. And he had a short mustache, didn't he—a little black mustache?

A. Yes, sir; he had a little mustache when he was up there, as much as I could say.

Q. Wasn't it just about such a mustache as this man had you saw in the coffin over here?

A. I didn't look at him; I could not say.
Q. Do you remember anything the man wore at all?
A. They had belts on around here.
Q. That is about all you remember about it?
A. Yes, sir; I seen they had belts.
Q. How long had you been around there?
A. I came there the seventh of September.
Q. You don't know anything about Cherokee Bill only what you hear people say here?
A. No, sir; what I see I seen.
Q. You don't know anything about that man's being Cherokee Bill that you saw up there?
A. No, sir; I don't know his name. When I came here they told me it was Cherokee Bill, and when I came here I saw it was the same man.
Q. You saw him here in the court-house?
A. I saw him in the jail, too.
Q. Who took you in the jail?
70 A. I don't know what his name was.
Q. There was a man took you in the jail, wasn't there?
A. Yes, sir.
Q. He took you in there and called Cherokee Bill out, did he not?
A. Yes, sir.
Q. And had a talk with him?
A. Yes, sir.
Q. And you stood there and heard him talk, didn't you?
A. Yes, sir; I was in there.
Q. You heard that man call him Cherokee Bill, did'nt you?
A. Yes, sir; but I could pick him out myself.
Q. You didn't do it, though?
A. No; he didn't ask me to.
Mr. THOMAS H. BARNES (of counsel for defendant). Did you say that Jim French, or the other man, whoever it was, was close to you, and looked you in the face at one time?
A. I didn't look at the other man so close as I did at Cherokee Bill.
Q. That is not my question. Was the other man close to you, in a few feet of you, at one time?
A. I was about three, four feet from him at one time.
Q. You saw his face, then, didn't you?
A. Yes, sir; but I didn't look at him.
Q. Did he look at you?
A. Yes, sir.
Q. Didn't you look at him?
A. Yes, sir; he looked at me.
Q. You saw that man's face, then. He was wearing a little mustache then, was he not?
A. Yes, sir.
Q. You saw the man's face, although he was wounded, over here in a coffin, and while you would not be positive, didn't that look like the same man?
A. Well, it just looked like the same man, but I could not——
Q. That is what I thought.

71 The ASSISTANT DISTRICT ATTORNEY. Whether he was the same man or not you don't know?

A. I could not swear he was the same man.

Q. In other words, you don't know whether it was French and Cherokee Bill or Cherokee Bill and somebody else that robbed the store, do you?

A. No, sir.

(Witness excused.)

72 FLEM HARTER, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. In the Cherokee Nation.

Q. Were you at Lenapah on the day that Schufeldt's store was robbed, last November?

A. Yes, sir.

Q. Did you see the robbers when they first came up?

A. Yes, sir.

Q. Where were you?

A. I was on the scales with a load of wheat.

Q. Was Mr. Henry Schufeldt about there anywhere near you?

A. Yes, sir.

Q. The old man?

A. Yes, sir.

Q. What did the robbers do when they came up?

A. They came and taken him away from me.

Q. Which one of them did that?

A. This here man right there is the man that come and took him (referring to the defendant). He says, "Come in the house, old man, damn you, we want your money."

Q. Then what did you do?

A. I stood there.

Q. Didn't you go in the house, too?

A. No, sir; they just left me there, and I staid.

Q. This defendant here is one of the men?

A. Yes, sir.

73 Cross-examination by Mr. J. WARREN REED:

Q. You stood out there on the scales?

A. Yes, sir.

Q. When you learned there was a robbery there, didn't you go away?

A. No, sir.

Q. How did it come you stood there?

A. I stood there to hold my team. They left me there, and I staid.

Q. You were a whole lot excited, were you?

A. No, sir.

Q. You are excited now.

A. Maybe I am; but I wasn't then.

Q. Were you excited half as bad then as you are now?

A. I am not excited now.

Q. What were you doing while it was going on?

A. I was standing right by the wagon.
Q. What did you stand there and let them Indians rob the store for?
A. I didn't have any strings on them, and didn't want to have.
Q. You never had seen the men before?
A. No, sir; not as I know of.
Q. Did you see the Indian outside that watched the door?
A. Yes, sir.
Q. Was he a small Indian or a big Indian?
A. He was a good-sized man.
Q. How much would he weigh, 250—the one outside?
A. The one that came out asked me where his horse had went to——
Q. I am talking about the one that guarded the door out there; the Indian man.
A. That is the man that came out there then.
Q. Where was the other man?
A. I could not see him; he was in the store the most of the time.
74 Q. This is the man that guarded the door outside, was it?
A. Yes, sir.
Q. He was an Indian?
A. I didn't call him an Indian then.
Q. He is the one that guarded the door, and he is the one that they call the Indian, and the other man staid inside the door the most of the time?
A. Yes, sir; the other man staid inside of the store.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. This is the man [referring to defendant] that punched old man Schufeldt with the gun, is it?
A. Yes, sir; this is the man that took him away.
(Witness excused.)

74½ Mrs. JOHN GROVES, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. You are the wife of Mr. John Groves, are you?
Answer. Yes, sir.
Q. Were you in Lenapah on the day of the robbery there last November?
A. Yes, sir; I was.
Q. Where were you when the robbery was going on?
A. I was in the southwest part of the store.
Q. You were inside of the store, then?
A. Yes, sir.
Q. Did you see the robber who came in the store?
A. Yes, sir; I did.
Q. Did you see him fire a gun in there at any time?
A. Yes, sir; I saw him fire a gun.
Q. Have you seen that man since?
A. Here in court; yes, sir.
Q. Is he here now?
A. Yes, sir.
Q. Is this defendant the man?
A. Yes, sir; he is the same man.

Cross-examination by Mr. J. WARREN REED:

Q. Were you near the office or near the front of the store?

A. I was near the front.

Q. You were considerably excited, I reckon, when this man came there, were you not?

A. Not very. I don't think I was.

75 Q. Did you see them both or only one of them?

A. Both of them.

Q. What did they do?

A. They came up there I suppose like robbers, and done their work.

Q. Right in there and left?

A. Well, they staid around there quite a little while.

Q. Were they there two hours?

A. No, sir.

Q. Five minutes, or ten?

A. Well, I could not say how long.

Q. About how long were they there?

A. About 10 or 20 minutes, or more.

Q. They came right up there with their guns, jumped off their horses, and came into the store, pushed old man Schufeldt into the store, didn't they?

A. I didn't see them get off their horses at all.

Q. They pushed old man Schufeldt into the store, didn't they, or didn't you see that?

A. Yes, sir; I did.

Q. How many people were in the store?

A. I could not say.

Q. How many were in the store?

A. I don't know. There was not any more than a dozen.

Q. Was there about a dozen?

A. Yes, sir.

Q. When the shot was fired, and the shooting was done in there you think there was about a dozen in there?

A. Yes, sir.

Q. These people who were in there tried to get out, didn't they?

A. No, sir.

Q. None of them run?

A. No, sir.

Q. All of them staid there?

A. Yes, sir.

Q. Scattered all around in the room or all bunched up?

A. All bunched up.

76 Q. What corner did they stand in?

A. They were at the front for awhile, and then they took them to the back end.

Q. How many would be between you and the middle door?

A. I don't know whether there was any or not.

Q. You don't remember that?

A. No, sir.

Q. You hadn't ever seen any of the men before, had you?

A. No, sir.

(Witness excused.)

77 JOHN BEARD, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. About seven miles southeast of Lenapah.

Q. Were you at Lenapah on the day of the robbery last November of Schufeldt's store when Melton was killed?

A. Yes, sir.

Q. Where were you when the robbers came up?

A. I was standing about four or five steps right north of the north door; that is, the northwest door facing the west.

Q. What did you first see of the robbers?

A. The first thing I seen was a couple of men come up right in a tolerable fast lope, and they came up to the south end of the porch and throwed their reins over their horses' heads and jumped down, and old Mr. Schufeldt was standing on the porch and the largest man says, "Come in here, we want you," and then they went on in. And I was talking to a man there, and this man I was talking with got on the wagon and drove on off, and I noticed these men when they came in. I thought maybe they were hunters coming in to get am'unition when they first came up, and then I noticed the largest one; he looked pretty desperate, and I thought to myself I would look in and see what was going on in there, and I looked in and I seen them holding up their hands, and then I went around——

Q. Who was holding up their hands?

A. The men that were in there. I went around to Mr. Schufeldt's stable and hid my pocket book to keep them from getting the money if I could. And then I met one of the clerks around in the lot, and I

78 says to him, "Charley, I believe there is some boys in there robbing the store." "Oh," he says, "I guess not." I says, "Yes," and just then I saw the largest man come by the north door. It is about half glass, and I could see his Winchester in his hand. And then I went out around in front. I come on the porch, and there was a man on the scales, the scales is right in front, he was there with a load of wheet, and he was there when they come up. He is here as a witness. His name is Hartman or Harter.

Q. Have you seen either one of those men since that time?

A. Yes, sir; I think I have.

Q. Where?

A. I saw one near the Kansas State line and one about three miles north of Nowata.

Q. Is there one of them here now?

A. Yes, sir.

Q. Which one?

A. That is the gentleman sitting right there.

Q. This defendant?

A. Yes, sir.

Q. You saw him after the robbery, did you?

A. Yes, sir.

Q. Had you ever seen him before the robbery?

A. I think not; not that I know of.

Q. Where did you see him after the robbery, before he was arrested?

A. Up by the Kansas line once, and down by Nowata, about three miles north of Nowata.

Q. How long after this robbery was that?

A. The first time I believe it was about a month, and the next time was longer than that. I expect six weeks.

Q. And this is the man that was engaged in the robbery there?

A. Yes, sir.

79 Cross-examination by Mr. J. WARREN REED:

Q. You were not inside of the house?

A. No, sir.

Q. You didn't know there was any robbing going on, of course, until you looked in and saw them holding their hands up?

A. No, sir.

Q. You didn't pay much attention to it until somebody told you?

A. No, sir; nobody told me. I went to the door and looked in and saw them hold their hands up.

Q. Then you skipped out and hid your pocketbook?

A. Yes, sir; I went to the stable.

Q. How far did you go to hide it?

A. I went about 30 yards, I suppose.

Q. Did you stay out there?

A. I did awhile, until I come around and saw what was going on.

Q. I don't suppose you went back up to the door any more; you went around outside some place where you could look a little?

A. I went around in front where I saw them go in.

Q. You hadn't ever seen either one of the men before?

A. I don't think I had.

Q. You don't know that you ever saw either one of them afterwards, do you, unless this defendant is one of them?

A. Yes, sir; I am positive I saw this one afterwards.

Q. You are positive, are you?

A. Yes, sir.

Q. What time of day was it?

A. It was about half past 12 o'clock.

Q. Were they old men or young men?

A. Young men.

80 Q. You think this defendant is one of the men. That other man, whoever he was, was he a large man or a small man?

A. Small man.

Q. What would he weigh?

A. I suppose he would weigh about 130 pounds.

Q. He was an Indian, was he not?

A. I don't think he was a full-blood.

Q. Was he as much as a half-breed, or three-quarter Indian?

A. Yes, sir; he was about half; not over half, I don't think, or hardly half.

Q. You think he might have been about a half-breed?

A. About a quarter, I taken him to be.

Q. What kind of an Indian, Cherokee or what?

A. I don't know as to that.

Q. What kind of a hat did the Indian wear?
A. He wore a brown hat, I believe, and gray clothes.
Q. Brown hat, or white or black?
A. Brown hat.
Q. Large or small hat?
A. Tolerable good size hat.
Q. Is that the one you call the Indian fellow? Was it a very large hat or a medium size hat?
A. Yes, sir; pretty good size hat.
Q. What *you* would call a medium size?
A. No, sir; a little above the medium size. It was a larger hat than mine, broader rim.
Q. Was it an old or new one?
A. It was a new hat, I suppose. It looked pretty new.
Q. You are sure it was a brown hat?
A. Yes, sir.
Q. What color was his overcoat?
A. He had no overcoat on.
Q. Was he carrying his overcoat?
81 A. His coat was on his saddle. There was a coat on the saddle.
Q. What other clothes did he have on? What was his undercoat then?
A. I took it to be a gray coat.
Q. Gray linsey or gray jeans, or gray broadcloth, or what?
A. Wool, I suppose.
Q. Gray wool coat?
A. Yes, sir.
Q. Was it a dress coat or not?
A. It was one of the style of mine.
Q. What color pants did he have on?
A. Gray.
Q. Did he have any gun?
A. Yes, sir.
Q. What kind?
A. It was a Winchester, 3856.
Q. Did he have any pistol?
A. Yes, sir; I think so.
Q. Can't you see?
A. I saw a belt on him. I didn't see the pistol. I saw the Winchester.
Q. Belt around under his clothes here?
A. Yes, sir.
Q. Could you see the cartridges in it?
A. No, sir; but I picked up one of the shells that he shot out at Frank Schufeldt.
Q. If he had a belt on that way under his coat could you not see the cartridges?
A. Yes, sir.
Q. How do you know there was any cartridges in it?
A. I saw the cartridges here where his coat was open.
Q. How many times did he shoot at Frank Schufeldt?
A. I saw him shoot once.

Q. Where was he when he shot at him?
A. He was standing right at the end of the scales.
Q. Where was Frank?
A. Frank was up stairs looking out of the window, the west window.
Q. He just shot right up at him, did he?
A. Yes, sir.

82 Q. Now describe the man that was inside? Was he a smaller man some than the one outside?
A. They were both inside.
Q. I am asking about the other man that you have not described? What would he weigh? Less than the one you have been describing?
A. No, sir; I suppose he would weigh 165 or 170 pounds.
Q. He was a white man, wasn't he?
A. No, sir.
Q. What was he?
A. There he is right over there [pointing to the defendant].
Q. Was he a Jew or a gentile?
A. I would call him pretty well mixed up, Indian, white man, and negro, I suppose.
Q. You say this defendant is him because you see him. You can not describe him, can you?
A. Yes, sir; I have seen him.
Q. Now, don't look at him for a bit. What color eyes did the man have you saw up there?
A. He had dark eyes.
Q. Were they dark or blue?
A. Dark eyes, I took them to be.
Q. That is the best you can say, is it? That is the best you can give now?
A. Yes, sir.
Q. What kind of a hat did he have on?
A. Black hat.
Q. You are sure of that?
A. Yes, sir.
Q. This is the same hat, is it not [referring to defendant's hat]?
A. I don't know whether that is the same hat, but it is something like that. The hat he had there, I believe, was larger than that, and broader rimmed.
Q. Still larger brim, and a b*a*lck?
A. Yes, sir.
Q. What color coat did he have on?
A. He had a brown coat, I believe.
Q. Brown or black?
A. Brown.

83 Q. What color was his overcoat?
A. He didn't have any overcoat there. He had a slicker on his saddle.
Q. Did he wear a mustache, or a long beard, or was he shaved?
A. He didn't have no mustache to speak of.
Q. What color was his pants?
A. His pants were brown too. And high-heeled boots.
Q. Did he have a gun?

A. Yes, sir; a Winchester, 4590.
Q. Did he have any pistol?
A. I didn't see any.
Q. He didn't have any belt?
A. Yes, sir; I could see a belt on him.
Q. Could you see it under his clothes?
A. Yes, sir.
Q. Did he have any cartridges?
A. Yes, sir; I guess he did.
Q. Are you sure?
A. Yes, sir; he throwed some out there, and then went back in the store and said he would want to get some more.
Q. Were they riding or walking?
A. They were riding.
Q. Mules or horses?
A. Horses.
Q. Large or small?
A. Pretty good size horses.
Q. What color were they?
A. One was a bay and the other was a sorrel. Both had white in their faces.
Q. Both bald-faces?
A. Yes, sir.
Q. Was the gray horse bald-faced?
A. I didn't see any gray horse.
Q. What did you see?
A. Bay and sorrel.
Q. Were they riding barebacked or with saddles?
A. Had big heavy saddles.
Q. Both alike?
A. Yes, sir; a great deal alike.
Q. When they left where did they go to?
A. They went southwest of Lenapah.

84 Q. Where did you first see this defendant here at court?
A. When they brought him from the jail in the wagon.
Q. A prisoner?
A. Yes, sir.
A JUROR. Did you see him shoot from the north door there?
A. No, sir; I wasn't in the store.
The ASSISTANT DISTRICT ATTORNEY. You saw him pass that door, I believe you say, once?
A. Yes, sir.
Q. Do you know whether that was before or after the shooting?
A. That was before he shot.
(Witness excused.)

85 W. C. SMITH, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. Fayetteville, Arkansas.

Q. Do you know the defendant when you see him, Crawford Goldsby?
A. Yes, sir.
Q. Did you have him in your custody after he was arrested?
A. Yes, sir.
Q. If he made any statement to you in regard to the Lenapah killing, state what he said?
A. Well, he asked me about it, what they would do with him. He said there was others shooting there besides him. He said he didn't see how they could prove that he done the shooting.
Q. That is all he said about it?
A. Yes, sir.

Cross-examination by Mr. J. WARREN REED:

Q. When was that?
A. It was the evening we came down with him.
Q. You had him under arrest?
A. Yes, sir.
Q. You were on the train, were you?
A. Yes, sir.
Q. The train was running?
A. Yes, sir.
Q. Was there anybody present?
A. No, sir; he and I were sitting talking together in the caboose.
86 Q. You were trying to pump him, were you, I reckon?
A. No, sir; he asked me what to do, and asked my advice, and asked me if they would turn his body over to his folks if they hung him, and I told him they had not hung him yet.
Q. You had him charged with robberies and murders and everything else?
A. Yes, sir.
Q. Did he know what you were talking about?
A. He spoke about the Lenapah case, and the other murder case, too.
Q. How many charges did you have against him; fifty?
A. I could not tell you.
Q. A dozen?
A. I think there was about a dozen.
Q. You were talking to him in a general way, and he said——
A. He asked me for advice—he asked me if they would let his folks have his body if he was hung, and I told him they had not hung him yet.
Q. He wanted to know how they could tell who did the shooting when there was other people that shot?
A. Yes, sir.
Q. Whole lot of shooting going on, and how they could tell who done it; isn't that right?
A. He said there was others shooting besides himself.
Q. You were talking about the amount of shooting that was done, wasn't you?
A. No, sir; I hadn't said a word about the amount of shooting.
Q. It just came up in that conversation in that way?
A. Yes, sir.
The ASSISTANT DISTRICT ATTORNEY. He was talking about the Lenapah robbery when he said that?

A. Yes, sir.

87 Mr. J. WARREN REED (of counsel for defendant). Didn't you ask this man the direct question about the Lenapah robbery, and didn't he tell you that he didn't know anything about it?

A. No, sir; he asked me what charge they were trying him on, and I expect I told him if they convicted him for murder at all it would be the Lenapah murder; that I didn't know whether they could prove the other ones or not.

Q. Didn't you say it this way—did he not say this to you, that how could they prove he done the killing or who done the shooting when there was other folks in the Territory killing people around?

A. No, sir; he said when there was others shooting there—when there was others shooting besides himself, how could they prove he done it.

Q. There was a whole lot of rewards for this man, wasn't there?

A. I could not say as to that. There were some offered.

Q. A price on his head?

A. Yes, sir.

Q. You were interested in getting it?

A. We haven't got it yet.

Q. You were interested in getting it, wasn't you?

A. I am going to be interested in trying to get it.

The COURT. Was there any reward offered for the murder?

A. None that I ever heard of.

The COURT. It was the robberies of post offices and express?

A. Yes, sir; just by the railroad and express companies.

Mr. J. WARREN REED (of counsel for defendant). There was a robbery in connection with this case?

A. Yes, sir; but no reward that I ever heard of.

Q. That was a post office there?

A. Yes, sir; there is one there.

88 Q. There is a reward for all these, isn't there?

A. Yes, sir; where they are convicted.

(Witness excused.)

89 REN VANN, having been duly sworn upon behalf of the Government, was examined in chief by Mr. J. B. McDonough, the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. Lenapah.

Q. Do you live right in town?

A. Yes, sir.

Q. Do you know the defendant, Crawford Goldsby, sometimes known as Cherokee Bill?

A. Yes, sir; when I see him.

Q. Did you see him at a dance some time after the Lenapah robbery?

A. Yes, sir.

Q. Where?

A. At Isaac Rogers.

Q. Did you have any conversation with him there about the killing at Lenapah, or did he tell you anything about the killing at Lenapah?

A. I heard him say when he shot at the man he didn't shoot at him to kill him, he just shot at him to scare him away from the window.

Q. Isaac Rogers is the one that helped catch him afterwards, is he not?

A. I guess so.

Cross-examination by Mr. J. WARREN REED:

Q. Were you at Isaac Rogers when he was captured?

A. No, sir.

Q. Where were you?

A. I was across on the other side of the Verdigris, about three miles from Lenapah.

Q. When was this talk?

A. The second night after Christmas, I believe—Christmas night.

(Witness excused.)

90 PADEN TOLBERT, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. Vinita, Indian Territory.

Q. You are a deputy marshal of this court, are you?

A. Yes, sir.

Q. Did you hear of the Lenapah robbery and killing after it occurred?

A. Yes, sir; I heard of it.

Q. How long after it occurred, do you know, when you heard of it?

A. Only a day or so; I would not be positive; one or two days.

Q. Do you know where you were on the day it was said to have occurred?

A. Yes, sir.

Q. Where?

A. I was at Charley Patton's store about fifteen miles from Sapulpa.

Q. This man here as a witness?

A. Yes, sir.

Q. Was he at home?

A. Yes, sir.

Q. Were you there all day?

A. Yes, sir; I staid right in the house.

Q. He was there, too?

A. Yes, sir.

Q. How far is that from Sapulpa?

A. Well, it is fifteen or 18 miles.

Q. What direction from Supulpa?

A. A little southeast, probably.

91 Q. Do you know how far it is from Lenapah?

A. Not exactly. It is a considerable distance, though.

Q. Were you at that time making any effort to capture the defendant, Cherokee Bill, or making any plans?

A. Yes, sir; we were laying at Patton's house, expecting him to come sooner or later.

Q. Did you have Charley Patton assisting you in the matter? Was he helping you?

A. Yes, sir.

Q. State whether or not, after you heard of the robbery and killing at Lenapah, you had Patton go to Cherokee Bill.

A. Yes, sir; four or five days afterwards.

Q. When he returned did he give you any locket, or watch charm, or anything of the kind?

A. He gave me a locket or watch charm.

Q. I will ask you to look at the charm I now hand you and say if that is the one or not.

A. Yes, sir.

Q. How long was Patton gone when you directed him to go to Cherokee Bill?

A. Well, we left Patton's house one day, and he was to go up in the neighborhood of Red Fork and see if he could find Cherokee Bill and the others, and I think he came to Supulpa that same night. He knew we were there and he came there and let us know—know that he seen them. I don't remember whether it was the night after that, after we left there, or still another night.

Cross-examination by Mr. THOMAS H. BARNES:

Q. When was that?

A. Last November.

92 Q. Where were you on the day of this robbery?

A. I was at Patton's house. I had been there for two or three weeks.

Q. Who is Patton?

A. He is a witness here in this case.

Q. Is he a white man?

A. Yes, sir.

Q. Where is his house?

A. About fifteen or twenty miles from Sapulpa, on Snake Creek, I believe; in the Arkansas bottoms, right on the edge of Snake Creek.

Q. Sapulpa is the furthest station out that way on the Frisco road?

A. Yes, sir.

Q. Where is that place with reference to Red Fork and Sapulpa?

A. It is just about the same distance, I should judge, from Red Fork as it is from Sapulpa; a very little further to Tulsa.

Q. You were there on the 9th of November, were you?

A. Yes, sir.

Q. How long had you been there?

A. I left there about the 16th or 17th, and I had been there 16 or 17 days.

Q. Who was there with you?

A. George Lawson, Ed Jackson, Arch Crump a part of the time, and a fellow named Dickson, a special agent for this K. & A. V. R. R., and Bill Smith.

Q. How far is it from where you were over to Lenapah?

A. I could not say anything like the distance.

Q. It is a good long ways, is it not?

A. It is quite a distance.

Q. Seventy-five or one hundred miles?

A. Oh, I could not say about the distance. I never looked at the map.

Q. You know the country there pretty well, don't you?

A. I never have been across over that section of country to Lebapah, and therefore I could not make an accurate estimate as to the
93 distance.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Do you know anything about the defendant ordering a new gun? Were you at Sapulpa, Tulsa, or Red Fork when the new gun that was supposed to come for him came?

Mr. THOMAS H. BARNES (of counsel for defendant). We object to that.

The ASSISTANT DISTRICT ATTORNEY. The gun that this defendant had at the time of this killing was a 4590; he afterwards disposed of that gun and ordered a new one.

Mr. THOMAS H. BARNES (of counsel for defendant). Have you got proof of what you are stating?

The ASSISTANT DISTRICT ATTORNEY. Yes; I am offering now to prove it, and will make it apply. He afterwards disposed of that, and got a brand new gun, and the officers were present when the gun came, and they looked at it and examined it, and let it alone. That is all I want to prove by this witness.

The COURT. He can state he saw a gun at a certain point there, and give a description of it.

The WITNESS. I saw a gun at Eagen's store at Sapulpa.

The ASSISTANT DISTRICT ATTORNEY. What size gun was it?

A. 4082.

Q. New gun, was it?

A. Yes, sir.

Q. Do you know what kind of a gun the defendant had when he was arrested?

94 A. I don't know; I heard he had a 4082. That he afterwards got this gun at Sapulpa and had this. I understood that. I have seen the gun since then.

Q. Was the one you saw since then a 4082?

A. Yes, sir.

Q. The one you saw there was a 4082, a new gun.

A. Yes, sir.

Recross-examination by Mr. THOMAS H. BARNES:

Q. When was it you saw that gun at Sapulpa?

A. It was sometime after the 18th of last November; I could not say just when.

Q. When did you next see the same gun?

A. I next seen it down in the marshal's office.

Q. You didn't see the defendant with any new gun yourself, did you?

A. No, sir.

Q. How far is it from Ft. Gibson to Claremore?

A. It is about 44 or 45 miles, I should judge.

Q. How far from Claremore to Nowata?

A. I don't know; I am not familiar with the distances up there.

Q. How far is it from Claremore to Lenapah?

A. I don't know.

The ASSISTANT DISTRICT ATTORNEY. When was it you saw that new gun at Sapulpa?

A. It was along towards the last of November, I guess, or in December. I would not be positive.

Mr. J. WARREN REED (of counsel for defendant). How far was Charley Patton's, where you were there, from the Red Fork country?

A. About 18 miles.

Q. You sent Patton out to see if he was there, and he came back and reported he was in that Red Fork country, did he?

A. Yes, he said he had seen him and talked with him.

95 The ASSISTANT DISTRICT ATTORNEY. And brought this charm with him?

A. Yes, sir.

A JUROR. Did he say where he got that charm?

Mr. THOMAS H. BARNES (of counsel for defendant). It don't matter about that. They have got proof on that. That would not be competent.

(Witness excused.)

96 *Map of the Indian Territory.*

The ASSISTANT DISTRICT ATTORNEY. I want to introduce in evidence, if you have no objection, this map of the Indian country.

Mr. THOMAS H. BARNES (of counsel for defendant). We have no objection; we want it in ourselves.

(The map was introduced in evidence and shown to the jury, the location on it of Lenapah, Nowata, Tulsa, Red Fork, Claremore, Gibson, Wagoner, and Talala, and the route of the K. & A. V. M. K. & T. and Frisco R. R. being indicated to them by the assistant district attorney.)

97 CHARLEY PATTON, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. In the Creek Nation.

Q. What is your nearest town?

A. Weloka.

Q. How far is that from Sapulpa?

A. It is called about 15 miles.

Q. Is your place, Weloka, near the Arkansas River?

A. Yes, sir; about a couple of miles.

Q. You know Paden Tolbert, do you?

A. Yes, sir.

Q. Do you know Crawford Goldsby, or Cherokee Bill?

A. Yes, sir.

Q. Was Paden Tolbert at your house along about the first of last November?

A. Yes, sir.

Q. Where were you when you first heard of the Lenapah robbery and the killing?

A. I was at my own place.

Q. Who brought the news to your place?

A. George Lawson.
Q. One of the marshals?
A. Yes, sir.
Q. Was Paden Tolbert there when he brought the news?
A. Yes, sir.
Q. How long had he been there?
A. He had been there somewheres along eight or ten days, I suppose.
Q. After that did you make any trip in search of the defendant, Goldsby?
A. Yes, sir.
Q. Where did you go?
A. I went up to Mr. Robert Turner's.
98 Q. Did you see him?
A. Yes, sir.
Q. Was he at the house?
A. No, sir.
Q. Where did you see him?
A. Out in the mountain about 600 yards from the house.
Q. Did you go out there to him?
A. Yes, sir.
Q. Anybody with him?
A. Yes, sir.
Q. Who?
A. Verdigris Kid was the name he went by.
Q. What was his other name?
A. Don't know.
Q. Did you have any talk with either one of them?
A. Yes, sir; I had a talk with them.
Q. Did you have any talk with the defendant, Crawford Goldsby, on the subject of the robbery at Lenapah?
A. Yes, sir; he spoke of having a little hold up up above there.
Q. What did he say?
A. He said he made a little hold up and got about $164.00, as well as I remember, and he had shot a fellow, I believe.
Q. Did he say why he had shot him?
A. No, sir; he never said.
Q. He just said he had shot a fellow?
A. Yes, sir.
The COURT. Did he say where the hold up was? Did he tell you where it was?
A. He said where it was, but I don't remember the town until I hear it called.
The ASSISTANT DISTRICT ATTORNEY. Was it Lenapah?
A. Yes, sir.
Q. Did you get anything from either of these parties there?
A. Yes, sir.
Q. What did you get?
A. A watch charm.
Q. Which one of them gave it to you?
A. Verdigris Kid.
Q. In the presence of the defendant, Crawford Goldsby?

99 A. Yes, sir.

Q. What did he say about it?

A. He said I had better be careful with it, or I would get into trouble over it; liable to.

Q. I will ask you to look at the charm I now hand you, and see if that is the one you got.

A. Yes, sir; it is.

(Charm introduced in evidence.)

Q. Did he say where he had gotten the charm?

A. I don't know as he did.

Mr. THOMAS H. BARNES (of counsel for defendant). I don't think it is competent to introduce this testimony.

The COURT. Did you identify it as the one taken?

The ASSISTANT DISTRICT ATTORNEY. Yes, sir; it was identified by Schufeldt as being the one that was taken from him by the other man in the presence of this defendant.

Mr. THOMAS H. BARNES (of counsel for defendant). It was given to this witness by another party, who said to be careful, and yet at the same time he said nothing that would connect this defendant with the possession of this charm. Now, as a matter of fact, we claim, if I understand the testimony, that Verdigris Kid and another party, not this defendant, did this robbery and killing. And it seems to me that this is not competent evidence against this defendant.

The ASSISTANT DISTRICT ATTORNEY. It is given just when the defendant has said he had a little hold up and killed a man.

Mr. THOMAS H. BARNES (of counsel for defendant). That was another conversation.

The COURT. Did he give you this at the same time of that conversation?

100 The WITNESS. Yes, sir.

Mr. THOMAS H. BARNES (of counsel for defendant). I understood him to say he had two conversations.

The COURT. No; he says at the same time. I think it is competent.

Mr. THOMAS H. BARNES. We will save an exception.

The COURT. Yes.

Cross-examination by Mr. THOMAS H. BARNES:

Q. How long were you there with these parties?

A. I was there from about 3 o'clock until about 9 in the night.

Q. You had several talks, didn't you, while you were there with them?

A. Yes, sir; we talked a good deal.

Q. Didn't you intend for the jury to understand awhile ago, when you first give in your testimony, that you had a talk with this defendant, in which he spoke of having had a hold up and got $160.00 and had to kill somebody, or something of the kind; and then that after that time further along while you were there this other conversation occurred while you were there on the same trip, but at a different time?

A. It wasn't at different times.

Q. But the conversation run over three or four hours?

A. No, sir; I guess not.

Q. You don't undertake to say that that was given to you at the same moment that this man was telling you about the hold up, do you?

A. It was given to me, though, the same evening.

Q. That might be, but still that is the way I thought you put
101 it awhile ago. How long was it, after you had this talk, was it that this man give you this thing?

A. It was an hour, I suppose.

Q. You knew Sam McWilliams, didn't you?

A. I knew the Verdigris Kid.

Q. They were one and the same, were they not?

A. I can't tell you.

Q. Don't you know that Sam McWilliams was raised on the Verdigris River?

A. I don't know where he was raised.

Q. Do you know how he got his name?

A. No, sir.

Q. Did he tell you in that conversation?

A. No, sir.

Q. How did you know he was the Verdigris Kid?

A. Because the rest of the boys called him that.

Q. You had been running with him?

A. No, sir.

Q. You knew him well?

A. I hadn't known him so awful well. I had seen him enough to know him.

Q. You knew his other name, I guess?

A. No, sir; I didn't know his other name. I had heard his other name, but I could not say for certain what was his name.

Q. Verdigris Kid is half Indian, is he not?

A. I don't know what he is.

Q. Did he not appear to be part Indian?

A. I guess he was a little Indian; yes, sir. He claimed to be a little Indian.

Q. Do you know any of his people?

A. No, sir.

Q. Did you know Dick Sullivan's wife in her lifetime?

A. No, sir.

Q. Did you know what her first husband's name was?

A. No, sir.

Q. How old was Verdigris Kid?

102 A. I don't know. He looked to be about 19 or 20.

Q. He looked to be part Indian, didn't , although you could not say how much he was?

A. No, sir; I could not say.

Q. He had Indian blood though, didn't he?

A. Well, he looked like an Indian, some.

Q. He had some of the color and some of the features, didn't he?

A. His hair showed Indian.

Q. How often had you been with him?

A. I could not say for certain.

Q. How far did you have to go to find the man from where you lived, at the time you speak of seeing him?

A. About 17 miles.

Q. When was that?
A. That was along about the 16th or 17th or 18th of November.
Q. How tall was Verdigris Kid?
A. I don't know how tall he was.
Q. As tall as you are?
A. No, sir.
Q. He was pretty fair height and size, wasn't he?
A. Oh, I suppose so.
Q. How much would he weigh?
A. About 130 pounds, I suppose, to guess at it.
Q. How often have you been arrested?
A. I never was.
Q. Haven't they got any charges against you?
A. Yes, sir.
Q. How did you manage to keep from being arrested?
A. I come and give up.
Q. Weren't you arrested after you give up?
A. I guess I was. I give up to a deputy marshal, but he didn't have to arrest me.
Q. How often have you done that?
A. Twice, is all.
103 Q. How often have you been in jail?
A. Once.
Q. Charged with whiskey?
A. Yes, sir.
Q. Anything else?
A. No, sir; a six-shooter writ, I believe, was against me.
Q. Where?
A. Muskogee.
Q. How many whiskey charges?
A. Two.
Q. Have you ever been charged with anything else?
A. No, sir.
Q. You have been here under arrest, haven't you?
A. I came and gave up to a deputy marshal and come down and gave bond.
Q. Have you got any case pending against you now?
A. Yes, sir.
Q. Was there a case pending against you at the time you were acting for these officers?
A. Yes, sir.
Q. And they promised to see that that was thrown out if you would help them, didn't they?
A. I don't know as they——
Q. Tell us if they did, it won't hurt anything.
A. They promised to help me out if they could, and do all they could for me. I told them I would do all I could for them.
Q. How much money were you promised of the reward?
A. I do not know how much.
Q. They promised to divide the reward, too, didn't they?
A. Yes, sir.

Q. Did the marshals stay awhile at your house?
A. Yes, sir.
Q. Got to be pretty good fellows; hale fellows well met?
A. Yes, sir.
Q. Did they pay you for their board?
A. Yes, sir.
Q. How much did they pay you for going over on that trip?
A. I don't know.
Q. What is the reason they have not helped you out as they
104 promised?
A. I don't know, sir.

The ASSISTANT DISTRICT ATTORNEY. I didn't know there was any case against this witness. This is the first I ever heard of it.

Mr. THOMAS H. BARNES (of counsel for defendant). You were pretty well in the confidence of this Kid and Cherokee Bill, it seems. How many of these robbers that have ranged in that country up there have you been acquainted with?
A. I could not tell you.
Q. You know them all, don't you?
A. No, sir.
Q. How many of them do you know besides Cherokee Bill? How many of them have you fed besides him?
A. Oh, I fed Cherokee Bill and Bill Cook, and Skeeter.
Q. Curtis Dasin?
A. No, sir.
Q. William Lucas?
A. I fed him.
Q. Jim Turner?
A. I never fed him after he went on the scout, but he has eat at my house, all right.
Q. Did any of them ever divide with you any?
A. Why, yes, sir.
Q. They divided with you. I have no doubt you got some of Cherokee's money?
A. Yes, sir.
Q. You stand in with the robbers all around, and the officers, too. How much did you get out of Cherokee?
A. I don't know.
Q. Sam Brown; what about him? He is a robber, too, is he not?
A. I don't know anything about him by that name.
Q. Did you ever run with Jim French?
A. No, sir.
Q. Did you ever feed him?
A. No, sir.
Q. Jim Doolin?
A. I know him.
Q. Tulsa Jack?
A. I don't know him.
Q. Slaughter Kid?
A. I don't know him.
105 Q. Bitter Creek?
A. I don't know him.

Q. Joe Booker?
A. I don't know him.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. What kind of a Winchester did the defendant have at that time?
A. He had been packing a 4590 Winchester, and I supposed it to be his old gun. I never picked it up and examined it close.

(Witness excused.)

105½ Government rests.

106 Be it further remembered that after the United States had rested its case in chief, the defendant to maintain the issue on his part introduced and examined the following witnesses:

James Rose, George Merrill, Bert Gray, John Foreman, Joe Roach, George Vann, Tom Lowe, Samuel Candy, Mrs. Lena Cochran, Joe Nave, James Turley, Adrian Swope, Robert Harris, Tom Harrison, George Walch, John Vann, Mrs. Ellen Lynch, Georgia Brown, Jacob B. Young, Frank Blackman, Clarence Goldsby, Mrs. Lena McGhee, Mandy Foster, whose testimony and the exception taken thereto by the defendant at the time are in words and figures as follows:

107 *Testimony offered by the defendant.*

JOHN SCHUFELDT, being recalled by the defendant for further cross-examination, was examined by J. Warren Reed, esq., and testified as follows, to wit:

Question. I asked you about the statement that you had made with regard to describing these men that were there. In the presence of Mr. Vann and Mr. John Rose, were you present when your father*ed* tak*k*ed, in which he described these men as one of them being an Indian and the other a white man?

Answer. I don't know that I heard him describe them at all.

Q. In the presence of John Rose, didn't your father describe them as one of them being an Indian and the other a white man?

A. No, sir; not that I know of.

Q. Did you see Mr. Roach there?

A. I saw him after he got over his scare. He run out of town a mile or two, and came back in an hour or so.

Q. He lives there in that vicinity?

A. Yes, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Your father went to Eureka Springs, and from there where did he go?

A. He is still at Eureka Springs. I had a letter from him yesterday.

Q. The service was returned not found, saying he had gone to
108 Nebraska?

A. I think the explanation of that is that his brother was staying there a few weeks, and he went off about that time. He lives in Nebraska.

Mr. J. WARREN REED (of counsel for defendant). We supposed he was here. Some of our testimony was to meet his supposed testimony.

The ASSISTANT DISTRICT ATTORNEY. You won't need to meet it then.

(Witness excused.)

109 JAMES ROSE, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. I live in Coo-wee-scoo-wee district, Cherokee Nation, near Lenapah.

Q. How long have you lived there?

A. I have been living there about 20 years—in that vicinity.

Q. Do you know John Schufeldt and his father—the old gentleman?

A. Yes, sir.

Q. Where were you at the time their store was robbed up there?

A. I was there in Lenapah at the time.

Q. State if you heard John Schufeldt or the old man, in the presence of each other, make any statement with regard to the description of the men——

The COURT. You need not make any statement about the old gentleman. He is not here, and has not testified in this case. John Schufeldt is all you can state about.

Mr. J. WARREN REED (of counsel for defendant). We desire to show that this conversation was among themselves there together.

The COURT. It does not make any difference who it was among. You must lay the foundation. There is no use talking about that. You can not lay any foundation against a man that is not here as a witness.

Mr. J. WARREN REED (of counsel for defendant). That is not the point we desire to make. If these men were there together in a
110 conversation, and the statement was made by old man Schufeldt in the presence of John, his son——

The COURT. Never mind. On what ground would you offer his evidence?

Mr. J. WARREN REED (of counsel for defendant). On the ground that John Schufeldt was present——

The COURT. You can impeach John Schufeldt, but you can not impeach him by anything said by his father.

Mr. J. WARREN REED (of counsel for defendant). We take it that it would be the same principle where it would bind the defendant.

The COURT. It is not the same principle, by any means.

Mr. J. WARREN REED (of counsel for defendant). We offer to prove that, and desire to save the point.

The COURT. Yes, sir.

Mr. J. WARREN REED (of counsel for defendant). What we offer to show is the statement made by John Schufeldt's father in his presence when these other men were in conversation, in his hearing, and that he didn't deny it.

The COURT. That is excluded. You can not affect a witness in that way. It may affect a man who is accused of a crime, but it is not competent to attempt to impeach a witness in that manner.

(Witness excused.)

111 GEORGE MERRILL, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. Lenapah, Indian Territory.
Q. How long have you lived there?
A. All my days, I guess, but about three years.
Q. Were you there at the time Mr. Schufeldt's store was robbed?
A. Yes, sir.
Q. Did you see the men that done the robbing?
A. Yes, sir; I saw them.
Q. How many men were there?
A. There was only two.
R. Do you know this defendant?
A. Yes, sir.
Q. How long have you known him?
A. About 6 or 7 years.
Q. Where did you first know him?
A. I first got acquainted with him at Ft. Gibson.
Q. How long ago?
A. I don't know. I guess about five or six or seven years ago.
Q. Did you live at Ft. Gibson at that time?
A. No, sir; not right exactly in Ft. Gibson. I was living on Fourteen Mile Creek, or Four Mile Branch.
Q. Where did the defendant live then?
A. He was staying there in Gibson.
Q. Have you been seeing him frequently since that?
A. Yes, sir.
Q. You say you saw these men that were in the robbery?
A. Yes, sir.

112 Q. Was the defendant one of them?
A. No, sir; it was a white man and an Indian—Indian fellow.
Q. Did you know Jim French?
A. Yes, sir.
Q. What was he?
A. He was what I would call a half-breed Indian.
Q. Where did Jim French live before he turned out to rob?
A. Near Gibson. I never knew him to live any other place, only he would be around Tahlequah up there.
Q. How long had you known him?
A. I have been knowing him three or four years, I guess, as near as I can think about it.
Q. Was he in that robbery?
A. Yes, sir; I taken it to be him.
Q. Which one of the men was he?
A. The smallest; one that staid out doors.
B. What size man was Jim French?
A. He was a small man.
Q. What color hair did he have?
A. He had black hair.

Q. Did he have any beard on his face?
A. No, sir.
Q. Did he have any mustache?
A. No, sir.
Q. Half-breed Indian?
A. That is what I would call him.
Q. Where were you when this robbery commenced?
A. When it commenced I was at Mrs. Vann's. I was upstairs asleep, and I heard a racket downstairs, and I got up and come down, and they said they were holding up Schufeldt's store, and I put my coat on and started down there, and this little fellow that was standing out there—Jim French—shot two shots towards me; did not come very close to me; and I stopped then and turned and got behind the store, and he turned around and walked off.
Q. Then you staid there until the other one came out?
A. Yes, sir.
113 Q. You saw the man that came out?
A. Yes, sir.
Q. You say the defendant is not the man?
A. No, sir; that man was a white man.
Q. What time of day was that?
A. I don't know exactly what time; between 12 and 1 o'clock.
Q. How far were you from the men?
A. I was between 15 and 20 yards.
Q. Had you seen this defendant shortly before that?
A. Yes, sir.
Q. Where?
A. I saw him down on Rabbit Creek. It wasn't quite a month before this robbery.
Q. Where did you see him?
A. At my brother's.
Q. Can you tell what kind of a hat he wore then?
A. He had a small, white hat on then.
Q. Do you know what kind of a gun he was carrying then?
A. Yes, sir; I believe I do. It was a 3856 Winchester.
Q. Do you know how long he had had the gun that he had when you saw him?
A. No, sir; I don't.
Q. How did you know the kind of a gun he had?
A. Because I saw the loads and it was 3856.
Q. Do you mean you saw the cartridges?
A. Yes, sir.
Q. Do you remember the kind of a horse that he rode then?
A. It was what I would call a black roan.
Q. What they call a blue roan sometimes?
A. Yes, sir.
Q. Have you seen the hat that is here, that we have here as being his hat, and coat, in my office?
A. Yes, sir.
Q. State whether they were such looking clothes as he was wearing at that time.

A. They looked like the same clothes to me. The hat did, and coat.

114 Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. That was the man you say you took to be Jim French?

A. Yes, sir; the little one out of doors was Jim French.

Q. He was part Indian.

A. Half-breed is what I would call him.

Q. Sort of a white-looking fellow?

A. He was a dark kind of a fellow.

Q. But the man that went in on the inside and did the robbery was a white man.

A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Big fellow, was he not?

A. Yes, sir; he was a large fellow.

Q. But you are positively sure he was a white man?

A. Yes, sir.

Q. Is there anybody there that knew you were there that day?

A. Yes, sir; everybody in town knows I was there. They knew me.

Q. What were you doing there?

A. I just come up to be rid'ng around. I wasn't doing anything.

Q. What did you go up there for?

A. I just went up there because I never had anything else to do but ride around.

Q. Where did you live at that time?

A. Down the river between six and seven miles.

Q. What do you you do up there?

A. Farm.

Q. How old are you?

A. Twenty.

Q. You live at home, do you?

A. Yes, sir; with my mother.

115 Q. What time did you get to Lenapah that day?

A. I went up there pretty early in the morning.

Q. What time did you leave home?

A. After sunup awhile.

Q. Did anybody go with you?

A. No, sir.

Q. Foot or horseback?

A. I went horseback.

Q. Riding your own horse?

A. Yes, sir.

Q. What kind?

A. Brown horse.

Q. Were you carrying a pistol with you?

A. No, sir.

Q. Winchester?

A. No, sir.

Q. Where did you go when you got to Lenapah?

A. I never went anywhere, only to Mrs. Vann's and laid down and went to sleep.
Q. What Vann is that?
A. Katie Vann.
Q. Any akin to the defendant?
A. Not that I know of.
Q. You slept two or three hours?
A. Something about that.
Q. And the thing that woke you up was the shooting?
A. No, sir; it was the racket downstairs that woke me up.
Q. Were you sleeping upstairs over the store?
A. No, sir; upstairs at a dwelling house.
Q. How far is that from the store?
A. I don't know; I guess it was about between 150 yards.
Q. What direction from the store?
A. No, sir.
Q. On which side of the railroad?
A. East side.
Q. When you went down there did you go into the store?
A. No, sir.
Q. How near to the store did you get?
A. I got between 15 and 20, I suppose.
116 Q. Did you tell anybody there who that was that did the robbing?
A. No, sir.
Q. You knew it was Jim French?
A. Yes, sir.
Q. Why didn't you tell someone it was?
A. They never asked me.
Q. You are supposed to be a good, law-abiding citizen?
A. Yes, sir.
Q. You didn't tell anyone who it was because they didn't ask you. Were you one of the gang?
A. No, sir.
Q. Have you been united with them at any time?
A. No, sir.
Q. Have you run with them any?
A. No, sir.
Q. Did you ever tell anybody who it was?
A. No; only my mother.
Q. When did you tell her?
A. That night when I went back home.
Q. You told her one of them was Cherokee Bill, didn't you?
A. No, sir; he is no white man; he is a nigger.
Q. Is a negro or Indian?
A. I would call him a negro.
Q. Was that white man as big as Cherokee Bill?
A. He looked larger than him.
Q. Was he about the color of Cherokee Bill?
A. He was what I would call a light complected white man.
Q. Light skin and light hair?
A. He had light hair and a little, light mustache.

Q. That was the man that went into the store?
A. He was in the store.
Q. In the store when you got there?
A. Yes, sir; I didn't go clear to the store——
Q. Did you see him come out of the store?
A. Yes, sir.
117 Q. Did you see the shot fired that killed Melton?
A. No, sir.
Q. That had been done before you got there?
A. Yes, sir.
Q. You say you had seen the defendant at your brother's before that. How long was that before?
A. It wasn't quite a month.
Q. What was he doing there?
A. I don't know. He came there after I got there.
Q. What were you doing there?
A. I was plowing down there.
Q. Where was that?
A. Seven miles west of Tallala.
Q. How far is Tal'ala south of Lenapah?
A. 24 is what we call it.
Q. What month was that?
A. November.
Q. What time in November?
A. I don't know.
Q. And that was a month before the robbery at Lanapah?
A. Yes, sir; just about a month. It wasn't quite a month, I know.
Q. What time in the day did the defendant get to your brother's, or did he come in the night?
A. It was in the evening. I do not know just what time it was.
Q. Was the sun down?
A. No, sir.
Q. What did he come for?
A. I never asked him.
Q. What did he do when he got there?
A. He never done anything.
Q. Was there anybody with him?
A. He was by himself when I saw him.
Q. Did Jim French come there later?
A. No, sir.
Q. Did you ever see him and Jim French together?
A. No, sir.
Q. Did you ever know about their robbing any stores together?
A. No, sir.
118 Q. Did the defendant have any Winchester when he came there?
A. Yes, sir.
Q. Were you at the house when he came?
A. No, sir; I was out plowing.
Q. Did you see him at the house?
A. He came out where I was plowing.
Q. What did he come out there for?

A. I don't know; I never asked him his business.
Q. Did he talk with your brother any?
A. Yes, sir.
Q. What did they talk about?
A. I don't know.
Q. Did you hear them talking?
A. No, sir.
Q. Did they go to one side and talk?
A. No, sir; he went down there where my brother was at work.
Q. Are you akin to the defendant?
A. No, sir.
Q. Have you ever been arrested for anything?
A. Never was in my life.
Q. You are sure that was a white man?
A. Yes, sir.

Redirect examination by Mr. J. WARREN REED:

Q. Did you see the defendant after that?
A. Yes, sir.
Q. After you heard of this robbery?
A. Yes sir.
Q. What kind of a hat did he wear the first time you saw him after that?
A. It was after Christmas when I saw him after that robbery.
Q. Where?
A. Down on Ross Creek.
Q. What kind of a hat did he wear then?
A. Dark black hat.

119 The ASSISTANT DISTRICT ATTORNEY. The defendant at the time he was at your brother's house had a 3856 gun?
A. Yes, sir.
Q. Did you see some 3856 shells picked up at Lenapah?
A. No, sir; I never seen any shells picked up.

Mr. J. WARREN REED (of counsel for defendant). Was it a hat anything like this [referring to defendant's hat]; that is, the one you saw the last time you saw him after Christmas?
A. Yes, sir; it was pretty much in that shape.
Q. Is this hat laying here anything like the one you saw him with before the robbery [referring to a white slouch hat]?
A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Is that Jim French's hat you have got?

Mr. J. WARREN REED (of counsel for defendant). No, sir; it is the defendant's hat.
Q. Did he have a coat on like this?
A. Yes, sir; that looks like the coat.
Q. You say that was about a month before this robbery?
A. Yes, sir; it wasn't quite a month.
(Witness excused.)

120 BERT GRAY, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. Sapulpa, Indian Territory.
Q. What business are you engaged in there at Sapulpa?
A. I am working for Eagin Bros. at this time.
Q. Merchants?
A. Yes, sir.
Q. How long have you been there?
A. A little over a year.
Q. Do you know the defendant here?
A. Yes, sir.
Q. That is, if you have seen him?
A. Yes, sir; I do.
Q. Did you ever sell him any clothes?
A. Yes, sir.
Q. When was the last clothes bill you sold him?
A. 17th of December.
Q. Take this hat now and tell the jury whether or not you sold him this hat, or one just like it [referring to a large black hat worn by defendant to court-house]?
A. I don't think I did. I don't hardly think we carried that hat.
Q. Was it anything like that?
A. No, sir; the hat I sold him last I believe it was one of these broad-brim hats.
Q. Wider than that?
A. Yes, sir; straight brim.
Q. Was it a black hat?
A. Yes, sir.
The COURT. Was it one of these stiff-brim hats?
The WITNESS. Yes, sir; I think it was. It was midnight when I sold it to him.

Mr. J. WARREN REED (of counsel for defendant). Then it was
121 a little wider than that?
A. Yes, sir.
Q. How about the crown—that is, whether or not it was a crown as high as that or resembled that?
A. It was midnight when I sold him this hat, and he got the hat box, and he picked the hat that fit him.
Q. What was the price of it?
A. I think it was $4 75 or $5.00.
Q. What did he have on at the time you sold him that hat; what else did you sell him?
A. I sold him a coat and vest.
Q. Did he put on the coat, vest, and hat?
A. He did.
Q. What d'd he do with the ones that he took off, if he took any off?
A. He just left them laying there in the store.

Q. Look at these and see if these are the same clothes he got from you; come and look at them. (Witness examines the clothes worn by the defendant.)

A. I could not swear to them positively unless I would compare them with the stock of clothing.

Q. What is your judgment about that?

A. I could not say positively that it was, but I think it is. We have clothing that resembles that, and I think we have some just like it, but as I said, it was about midnight, quite dark, and I didn't pay much attention to it.

Q. What did you do with the clothes he pulled off there?

A. They laid there until next morning, and I picked them up and put them up back of the boots and shoes, and then about the next day we put them on exhibition—that is, we hung them up there in the store.

Q. Would you know the clothes?

A. I think I would.

Q. Take these and see if they are the clothes?

122 A. Ed. Eagen and I taken the hat out a couple of days after that and shot a hole through it, just for pass time. I don't know whether that is the coat or not. I didn't pay much attention to it. I think it had a couple of holes in it, or vest, one or the other, right along here, looked like bullet holes. I remember the crowd was looking at them. I think it was a larger coat than that, but still maybe that is the coat.

Q. State whether or not you think that is the coat.

A. Yes; to tell the truth of the matter I never paid much attention to them. I just hung them up there. I had too much else to do.

Q. Was it a coat about that color or appearance?

A. I would not swear in regard to the coat, but that is the hat, because I shot that hole in it.

Q. State how that coat got here?

A. You asked me in regard to it, and I told you, and you telegraphed for it, but I never saw it since it come.

Q. It was sent here from Sapulpa?

A. Yes, sir.

Q. Since this case?

A. Yes, sir.

Q. When did it come, do you remember?

A. I believe it was about the 19th that I told you, and the next day, the 20th, it was sent for.

Q. It came here?

A. Yes, sir.

Q. You have seen it since?

A. No, sir; not until just now. I could swear positively to the hat, but I could not as to the coat and vest, as I haven't seen them for a month or two. Afterwards we took the coat and vest and put them away in a drawer.

The ASSISTANT DISTRICT ATTORNEY. I want the hat in evidence.

Mr. J. WARREN REED (of counsel for defendant). Yes; so do we.

123 Q. Is the vest I now show you the vest?

A. I think it is.

Q. You think it is?

A. Yes, sir; at least I have got a pair of pants just like it, and we have the goods there in the store.

Q. You say you can not be positive about the coat; you think it was a coat that looked like that?

A. Yes, sir; I could not swear positively. To the best of my knowledge I think there was a couple of bullet holes in it.

Q. Here is a bullet hole [showing witness coat].

A. That is the hole there I have been looking for. That is what everybody says was a bullet hole, or one just like that.

Q. Could you recognize it by the hole?

A. I would say I could.

Q. Did he get anything else there at that time? Did he get a gun?

A. Yes, sir.

Q. What kind?

A. I think it was a 4082, model of 1892, peep sight, ivory top sight.

Q. Winchester?

A. Yes, sir.

Q. That was on the 17th of December?

A. Yes, sir. I said it was model of 1892; there is a difference in the form. It might have been 1886. They are just alike.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. That was the gun that some of your house showed to the officer, wasn't it?

A. Yes, sir.

Q. Who ordered that gun for Cherokee Bill?

A. I don't know in regard to that. Mr. Eagen told me to order
124 a 4082 gun, and I ordered it.

Q. You don't know who ordered it for him?

A. I know what I have heard, but I don't know it positively.

Q. Did you see a man there at the time?

A. No, sir; I did not. All I know about the gun Mr. Eagen told me to order that gun, and I ordered it.

Q. How did the defendant know the gun was there when he came?

A. I don't know, sir, how he knew it.

Q. Did he pay for it when he came, or was it paid for before?

A. No, sir; he never paid for it.

Q. Was it paid for?

A. No, sir; it was not paid for.

Q. Has not been paid for yet?

A. No, sir; he owes us for it at the present.

The COURT. Was it charged to him?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Does he still owe you for the goods and clothing?

A. Yes, sir.

Q. Why didn't you collect off of him at the time?

A. He said he didn't have any money.

Q. Did you know who he was at the time?

A. Yes, sir.

Q. How did you come to be up at 12 o'clock at night?

A. He rapped at the back door and I got up. I was in bed.

Q. You didn't know who he was when you got up, did you?

A. I knew who he was before I opened the door. I asked him who was there, and he said he wanted to come in, and so I opened the door and let him in.

Q. Did you ask him who it was before he come in?

A. Yes, sir.

Q. What did he say?

A. He said it was Cherokee, and I said "Cherokee Bill?" and he said "Yes," and I asked him what he wanted and he said he wanted to
125 get in, and I thought a moment and let him in.

Q. He never said anything?

A. No, sir; not until he got in.

Q. Did he rob you when he got in?

A. No, sir. He said he wanted a gun and a hat and a shirt, and I got a shirt, and he said to get that gun, and I got it for him, and he said he wanted a coat and vest, and I got that, and he said he wanted a piece of paper. "I want to give you an order on my mother," he says, "I have got some money, but I don't feel like going around after it just now." And he set down and wrote an order, and said if he did not pay it his mother would, or something like that. Anyway, he gave us an order on his mother.

Q. You would not let him have these goods if it hadn't been the man it , would you; if you hadn't been afraid of him?

A. Well, it is just like this, he had a pretty good reputation, and I didn't feel like refusing him. They were in the habit of coming there, riding into town when they pleased, and as long as they didn't molest us any we didn't aim to do anything with them, but let them alone. They never done us any harm, and we had no reasons for doing them any.

Q. Who?

A. Cherokee Bill and the balance of the bunch.

Q. Was there anybody with him that night?

A. Not that I seen.

Q. Did you hear somebody?

A. No, sir; he said there was a couple of men out there with him, but I don't hardly think there was.

Q. Did he say who they were?

A. No, sir.

Q. Did he mean this man Williams, or Verdigris Kid?

A. I do not know who he meant.

Q. Did you ever see him with the Verdigris Kid?

A. No, sir; not that I know of.

126 Mr. THOMAS H. BARNES (of counsel for defendant). He had bought things of you before, hadn't he?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. In the same way?

A. No, sir. Always they would come in and get what they wanted, pay for it, and walk out. They generally paid for most everything they got.

Q. I am talking about this one.

A. They used always to come together.

Q. Was he there after the 17th of December?

A. No; that was the last time I saw him.

Q. Now, who was there with him at the time before that?

A. I didn't see anybody.

Q. Did he come there in the daytime?

A. Yes, sir.

Q. Did you ever make any attempt to have him arrested?

A. No, sir; I never did.

Q. Why not?

A. I didn't have any grounds for making attempt to have him arrested. I was perfectly willing to keep peace with him myself.

Q. You considered it was dangerous to take any steps in the matter, didn't you?

A. I didn't feel like going out after him, having him arrested, or doing it myself.

Q. Why didn't you assist the officers in having him arrested?

A. Just as I stated before; they came into town and they didn't molest us, and didn't rob us, and we were pleased to have it that way.

Q. That comes back to the other question. I want the reason for your giving him what he wanted, if it wasn't because you were afraid of him?

A. I don't know that I was exactly afraid of him.

127 Q. You didn't want to work up their enmity in any way, did you?

A. I didn't feel like falling out with them, being on the opposite side from them. I always treated them respectfully, and they done the same to us. I would treat them decent, but I didn't go out and try to capture them, or anything of that kind.

Q. Wasn't it because you were afraid they would kill you, or do some harm to you?

A. I was a little afraid of that; yes, sir.

Q. Didn't you have Cherokee Bill's gun once? Didn't you unload his gun once?

A. That evening I did; yes, sir.

Q. That night he was there?

A. Yes, sir.

Q. The old gun?

A. Yes, sir.

Q. What size gun was that?

A. I could not swear in regard to that, because I didn't pay that much attention to it.

Q. Wasn't it a 45-90?

A. I could not say that it was or that it was not; I don't know. The way I handled the gun was this: He says to me, "How do you work these sights?" It was one of these elevated sights.

Q. That was the new gun?

A. Yes, sir; and I took that and showed him as much as I knew about it; and then I believe I put the cartridges in for him—I believe I took it and drew the cartridges out—that was the way it was; and he handed me the gun and I stock them in; and then I believe I took the old gun and threw the cartridges out.

Q. What did you do with these cartridges?

A. He picked them up and put them in his belt. He gave me a cartridge, but I do not know whether it was one of them or one I give him.

Q. Have you got it with you?

A. Yes, sir.

Q. Is that the one out of the old gun?

128 A. I could not say whether it is or not.

Q. What number is it?

A. It is 40-82. I says, "Bill, give me a cartridge to remember you by." The boys around town were saving souvenirs, and I thought I would have one; and he took one out of his belt and handed it to me.

Q. You had already sold him some of that size, hadn't you?

A. Yes, sir.

Q. Did you tell anybody that night of his being there?

A. No, sir; nobody but the man that was in the store with me, named Smith.

Q. Did you tell anybody next morning?

A. Yes, sir.

Q. What size town is Sapulpa? How many stores there?

A. There are three general stores; two small drug stores.

Q. That was the 17th day of December?

A. Yes, sir.

Q. Did you see him along about the time of the Lenapah robbery, about the 8th of November?

A. No, sir; the last I remember of seeing him was just before the Red Fork robbery.

Q. That was along in the spring, wasn't it?

A. Yes, sir; I could not say when it was.

Q. That is the robbery that he and Bill Cook and Curtis Dasin and others are supposed to have committed?

A. Yes, sir.

Q. You saw him a short time before that, did you?

A. Yes, sir.

Q. You don't know how many times he changed his hat between the time you saw him and the time he came back there and left the white hat, do you?

A. No, sir.

Q. You don't know how many times he has robbed store and got a new hat, or anything of that kind?

A. No, sir; I don't know anything about it.

129 By the COURT:

Q. Who did you charge that new gun to?

A. I didn't really charge it to anybody. I never made any charge for it.

Q. Do you sell goods in that way?

A. It was just like this, he said that he would get the money and pay us, or would give an order on his mother.

Q. Wasn't there another man that ordered the gun for him, and didn't you charge it to him?

A. No, sir; I did not.

Q. Did he make the order direct on you to have the gun shipped?

A. Mr. Eagen instructed me to order the gun, and I ordered it. He got the gun I ordered.

Q. Don't you know that order was made on the request of some other man than the defendant, acting for the defendant?

A. I do not know it to be a fact, but I think it was. That is what I suppose.

Q. Do you know the man's name?

A. Yes, sir.

Q. What was his name?

A. I believe it was Turner. That is just simply hearsay. I don't know it to be a fact.

Q. Didn't you charge it on your books to him?

A. No, sir; I did not.

Q. Didn't the proprietor?

A. No, sir.

Q. Didn't the proprietor hold him responsible for it?

A. No, sir.

Q. How long did the gun stay there after it came before the defendant got it?

A. Several weeks, but I could not say how long it was; several weeks.

130 Redirect examination by Mr. THOMAS H. BARNES:

Q. I understand you to say they were in the habit of paying you for what they got, and the defendant has been in the habit of paying you for what he got there?

A. Yes, sir; as a general rule; I believe there was a few things he has not paid for. He didn't owe us anything at that time, I do not believe. I am not certain.

The ASSISTANT DISTRICT ATTORNEY. Do you know where the defendant was living at that time?

A. He was living at George Baker's, 8 miles of Sapulpa.

(Witness excused.)

131 JOHN FOREMAN, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. I live on Caney, about 20 miles above Tulsa.

Q. Do you know the defendant?

A. Yes, sir.

Q. Did you hear of the robbery and killing of a man at Lenapah?

A. Yes, sir.

Q. Now, with regard to that time, if he come to your house——

A. He come to my house on Friday night; I don't know what time in the night it was, but it was away in the night, and holloed, and I got up and opened the door and he came in, and he wanted something to eat, and I give him something to eat, and he wanted me to go and get some cartridges for him, and I told him I was afraid to go and get them for him, that I didn't like to do anything like that. He never insisted on me then, but he left.

Q. What size cartridges did he want?

A. He said 3856.

Q. Was that the kind that he used?

A. That is the kind that he called for.

Q. You say that was Friday night?

A. Yes, sir.

Q. Now, did you learn of the robbery after that?

A. Yes, sir; the next day I went to the timber to get some timber to make a fence, and in the evening I come by the post-office to get my mail, and the postmaster told me that Lenapah was robbed yesterday and there was a man killed. I heard it on Saturaday.

Q. You say that is 20 miles above Tulsa. Do you know how far it would be from Lenapah?

A. No, sir; I don't know, exactly.

132 The ASSISTANT DISTRICT ATTORNEY. What do you meant by "above," north or south?

Mr. J. WARREN REED (of counsel for defendant). No, south of Tulsa. (To the witness.) Do you know how far they call it to Coffeyville?

A. They call it 65 miles from that store to Coffeyville.

Q. He had been there the night before, on this Friday night?

A. Yes, sir.

Q. You heard of the robbery the next day in the evening?

A. Yes, sir; it was a little before sundown.

Q. You heard it had been done the day before, which would make it the day before—it would make it the day he was at your house, in the night?

A. Yes, sir.

Q. How long did the defendant stay there?

A. Not but a few minutes.

Q. Did he get something to eat?

A. Yes, sir.

Q. Did you know he was coming?

A. No, sir.

Q. What was the first you knew of it?

A. He knocked at the do'r.

Q. Could you tell what course he come to your house? Which direction did he come from?

A. I would not be positive, but I heard some shooting away in the night, off south of me, towards Tulsa, that is, southeast.

Q. How long before he got to your house?

A. It wasn't more than 15 minutes, I guess.

Q. Could you tell what time of night that was?

A. No, sir; it was pretty late in the night, I think.

133 Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Where do you live?

A. I live about 20 miles, I guess—I don't know whether you would call it northwest or northeast of Tulsa.

Q. It is northeast of Tulsa, is it not? If you lived northwest it would put you over in Oklahoma, would it not?

A. No, sir; I live about five miles east of the Osage line.

Q. How far do you live from Skiatook?

A. They call it 15 miles.

Q. What direction do you live from Skiatook?

A. It is a little northeast of Skiatook, if I am not mistaken.
Q. What is your nearest post-office?
A. McFall.
Q. Do you know where Five Mile Creek is?
A. No, sir.
Q. Do you know where the Verdigris River is?
A. Yes, sir.
Q. Do you live on that?
A. No, sir.
Q. How far do you live from it?
A. I don't know how far it is.
Q. Do you live east or west of it—I mean the Caney, or littl' Verdigris?
A. I live about four miles west of it.
Q. Do you know where Sequoyah is?
A. Yes, sir.
Q. How far do you live from Sequoyah?
A. I think they call it fifteen miles.
Q. He got to your place about 12 o'clock that night?
A. I would not say that time it was, but it was away after night.
Q. It was after 12 o'clock, was it not?
A. I would not say whether it was after 12, because I had
134 no timepiece, but I know it was late in the night.
Q. According to your best judgment it was after 12 o'clock, wasn't it, that he was there?
A. I would judge it to be after 12 o'clock.
Q. He didn't tell you where he had been?
A. No, sir.
Q. He didn't say anything more than what you have said, did he?
A. No, sir; he did not.
Q. He didn't tell you about the robbery, did he?
A. No, sir.
Q. Nor the killing?
A. No, sir; he did not.
Q. He wanted you to go and get the cartridges for him?
A. Yes, sir.
Q. 3856?
A. Yes, sir; that is what he said.
Q. He didn't say anything about the 3856 gun be'ng used in a robbery that day?
A. No, sir.
Q. You don't know how far it is from your place up to Lenapah do you?
A. No, sir.
Q. Was there anybody with the defendant at the time?
A. No, sir; he was by himself—that is, he come to my house by himself.
Q. I will ask you if it is not about 33 miles from your place to Lenapah?
A. I could not say, I have never been there.
Q. It shows 33 on the map here.
The COURT. What is the scale on the map?

The ASSISTANT DISTRICT ATTORNEY. The scale to the inch is not given, but there is a scale of miles here. It looks like it is about 10 miles to an inch. (To the witness.) Was there anybody with him?

A. No, sir; not that I saw.

135 Q. Did you hear anybody?

A. No, sir.

Q. Did he tell you about anybody being with him?

A. No, sir; he did not.

Q. Was he riding on a horse that you know?

A. No, sir; I never noticed his horse at all.

Q. You don't know a horse, do you, that these people are supposed to have gotten from Arthur Dodge between your place and Lenapah?

A. No, sir.

Q. You would not know that horse if you would see it?

A. I don't know that I would. I don't recollect that I ever saw the horse.

Q. Did you ask him to stay with you that night?

A. No, sir.

Q. Did he ask to stay?

A. No, sir; he didn't.

Q. Where did he want you to go to get the cartridges?

A. Skiatook.

Q. The next day was it you went after the mail?

A. The next evening.

Q. What time in the evening?

A. It was a little before sundown.

Q. What post-office did you go to?

A. McFall.

Q. How far is McFall from Caney Creek?

A. About two miles and a half, I should judge.

Q. How far from you?

A. About a mile and a half, or about two miles.

Q. How far is McFall from the railroad station?

A. Fifteen miles from Talala.

Q. What time in the day was it that the postmaster told you about it?

A. It was a little before sundown.

136 Redirect examination by Mr. J. WARREN REED:

Q. Do you know where Mr. James Morely lives?

A. Yes, sir.

Q. Would he live between where you do and Tulsa?

A. Yes, sir; he lives between me and Tulsa.

Q. Do you know where Joe Roach lived?

A. Yes, sir.

Q. Would he live between you and Tulsa?

A. Yes, sir; I don't know whether it is between me and Tulsa. Joe lives a little closer to me than Tulsa is.

Q. If the defendant here was coming from Joe Roach's neighborhood and Jim Low's neighborhood—do you know where they live?

A. Yes, sir.

Q. If he was coming from that direction, as to Lenapah which way would that be? Would it be going towards Lenapah or going the other way?

A. It would be going from the other way going towards Lenapah.

Q. Now, from where you heard the gun fired that night, would that make him coming from the neighborhood of these people if he was coming from the way the gun was fired?

A. Yes, sir.

(Witness excused.)

137 JOE ROACH, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. Coo-wee-scoo-wee district.

Q. How near do you live to Tulsa?

A. Five miles northeast.

Q. Do you know the defendant?

A. Yes, sir.

Q. State now if about the 9th day of last November——

The ASSISTANT DISTRICT ATTORNEY. You stated in your opening statement to the jury it was the 8th.

Mr. J. WARREN REED (of counsel for defendant). At the time he got in this man's neighborhood it was the 9th. I said he left Gibson on the 8th. I am tracking it back.

The ASSISTANT DISTRICT ATTORNEY. You can take it back if you want to. I am willing.

Mr. J. WARREN REED (of counsel for defendant). State if he came to your house at that time.

A. I could not tell you what day of the month it was, or what month, but he come to my house one day about noon.

Q. Which way did he come from?

A. He come from towards Tom Lowe's.

Q. About the middle of the day?

A. Yes, sir.

Q. How far do you live from John Foreman?

A. It is 17 or 18 miles, I think. I don't know exactly.

Q. Would you live between Tulsa and John Foreman's?

A. Yes, sir.

Q. How long did the defendant stay at your house that day?

138 A. He didn't stay there long.

Q. Was he walking or riding?

A. He was riding.

Q. Did he get off his horse?

A. No, sir.

Q. Was he by himself?

A. Yes, sir.

Q. Did you learn of this robbery at Lenapah after that?

A. Yes, sir; I heard something of it.

Q. How soon afterwards?

A. About a couple of days, I think, or so, as near as I can remember.

Q. Which direction did he go in? Do you know where a white man named Jim Turley lives?

A. Yes, sir.

Q. With respect to his place when he left there which way did he go?

A. He went in a kind of a west direction from my house, and that man lives west of me.

Q. Why didn't he stop with you?

A. I told him I didn't like for him to come around; the people had accused me of harboring him there, and I told him it would make it hard for me and I would rather he would not come about me.

Q. And he rode off?

A. Yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Was he alone?

A. Yes, sir.

Q. What kind of a horse was he riding?

A. I don't remember; kind of a sorrel, I think.

Q. Any white about it anywhere?

A. I think not; I am not certain.

Q. You didn't look very close at it, did you?

A. No, sir.

139 Q. Did he tell you where he had been?

A. No, sir.

Q. What was his reply when you told him they were charging you with harboring him?

A. He said he didn't want to give me any trouble.

Q. You knew him, did you?

A. Yes, sir.

Q. You are no akin to him, are you?

A. No, sir.

Q. Have you been harboring him?

A. No, sir.

Q. Why did they accuse you of it?

A. He had been there and eat as he passed, and folks talked about it.

Q. When had he been there before?

A. I could not tell you positively.

Q. You don't know what month this was?

A. No, sir.

Q. Or what day of the week?

A. No, sir.

Q. And you state about two days afterwards you heard about the Lenapah robbery and the killing?

A. Yes, sir.

Q. It might have been longer, might it not; more than two days after that?

A. It was two days, as near as I can remember.

Q. It may have been more?

A. Yes, sir.

Q. It may have been three or four days?

A. Possibil*ity* it might have been.

Q. Where was it you heard of the Lenepah robbery?
A. In the neighborhood around there.
Q. You live about five miles from Tulsa?
A. Yes, sir.
Q. There is a railroad station and telegraph office there?
A. Yes, sir.
Q. You live really nearer the railroad than Tulsa, don't you?
A. The road is in about a mile and a half.
Q. Do you live in the Cherokee or Creek Nation?
A. Cherokee.
140 Q. You live near the line, don't you?
A. Yes, sir.
Q. About how far?
A. Mile and a half.
Q. And a mile and a half from the railroad?
A. Yes, sir. I live worse than that from the line. It must be close on to four miles to the line west of me—the Creek line.
Q. The Oklahoma country corners right northwest of Tulsa?
A. No; the Oklahoma line is away west of where I live.
Q. How far?
A. It is a day's travel or more.
Q. You live about how far from the southern line of the Cherokee Nation?
A. Oh, I don't know.
Q. The line between the Creek and Cherokee country; how far are you from that line?
A. The line is just about a mile this side of Tulsa, going west. That would make it about four miles.
Q. How far do you live from Catoosa?
A. Twelve miles.
(Witness excused.)

Here court adjourned until Tuesday morning, Feb. 25th, 1895.

141 TUESDAY MORNING, *February 25th, A. D.* 1895—9.00 *o'clock.*

GEORGE VANN, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Q. Where do you live?
Answer. I live about six or eight miles east of Lenapah.
The ASSISTANT DISTRICT ATTORNEY. I have another map here I want to introduce. It is a post-office map, and it has got the distances, etc., on it. I don't want to introduce it now, but I will after awhile.
Mr. J. WARREN REED (of counsel for defendant). How long have you lived east of Lenapah?
A. I have lived there about 18 or 19 years, I guess.
Q. Where did you live before you moved to that place?
A. On Spring Creek, in the Cherokee Nation.
Q. How long have you lived in the Indian country?
A. I was born and raised there.
Q. How much have you travelled through the Indian country?

A. A good deal.
Q. Do you know a place called Lenapah?
A. Yes, sir.
Q. How often have you been there?
A. I goes there every week, and sometimes twice a week.
Q. Do you know a town called Coffeyville?
A. Yes, sir.
Q. Are you familiar with the location of that place?
A. Yes, sir; I had a *saw* mill in Coffeyville two years.
142 Q. Are you familiar with the location of the town of Claremore?
A. Yes, sir.
Q. And with Ft. Gibson?
A. Yes, sir.
Q. And with the location of Ft. Smith?
A. Yes, sir.
Q. Have you ever travelled over that country any before railroads were built?
A. Yes, sir; before it was settled any hardly.
Q. Tell the jury the distance it would be by the way you would have to travel now from Ft. Gibson to Lenapah, the place where this killing is said to have been committed?
A. When we used to travel through the country, before it was settled up, going in a straight direction, we would call it 40 miles from where we lived to Claremore, and 50 miles from Claremore to Gibson, but it would be 100 now, or further; we would have to go around the farms; I mean, from Lenapah to Ft. Gibson.
Q. Are you familiar with the country about Tulsa in the Creek Nation?
A. Yes, sir.
Q. Are you famil'ar with the country from Tulsa to Lenapah?
A. Yes, sir; I have travelled that country a good deal through that way.
Q. What would be your judgment of the distance before the country was settled up from Tulsa to Lenapah?
A. 75 miles.
Q. What would be the distance now?
A. About 85 miles, I would judge.
Q. Do you know the distance from Claremore to Tulsa?
A. Well, we used to call it, before the country was settled up, 25 miles, and it would be at least 30 miles to go around the farms.
Q. Are you familiar with the country between Ft. Gibson and Claremore now?
A. Yes, sir.
143 Q. Take it that a man was travelling through the country in the daytime, if a man wanted to avoid observation by people who might be living along, and select a road that would keep him under cover, to travel——

The COURT. That is a matter of common knowledge, of which the jury are the judges. The witness can state what he knows about the roads, but he can't give his opinion as an expert.

Mr. J. WARREN REED (of counsel for defendant). State the character of the country.

A. Part of it is level, and part very rough; and the way a man would have to go to get through the country now he would have to go around crooks and around farms.

Q. State whether or not it is fenced up.

A. It is fenced up terribly.

Q. What kind of fence?

A. Wire fence, generally.

Q. How much would that throw a man out of the usual way of travelling?

A. When I came through there last fall was a year ago I thought it threw me out a mighty heap; at least ten miles.

Q. That same condition of things would apply to these other places you have spoken of?

A. Yes, sir.

Q. Increase of distance?

A. Yes, sir.

Cross-examination; the ASSISTANT DISTRICT ATTORNEY:

Q. What is your business?

A. I am a farmer, and I run sawmills and one thing and another.

Q. Do you have sawmills all over that country? How is it you have run all over that country?

144 A. That was my own business to go and come whenever I pleased; and I had cattle and horses and things to go after, and I went after them.

Q. How long have you lived in that country?

A. About 18 or 19 years.

Q. You have been all over it?

A. Yes, sir.

Q. You know it pretty well?

A. Yes, sir; I know it awful well.

(Witness excused.)

145 TOM LOWE, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. J. Warren Reed, and testified as follows, to wit:

Q. Where do you live?

A. Five miles northeast of Tulsa.

Q. Do you know the defendant here?

A. Yes, sir.

Q. State whether he was at your place along last November, with reference to the Lenapah robbery, a short time before that; and if so, what time of day he come.

A. I don't know whether it was before or after. He was at my place, though.

Q. What day did he come to your house?

A. It was on Frida', if I am not mistaken.

Q. How long did he stay there?

A. Not a great while.

Q. Did he get something to eat?

A. Yes, sir; and fed his horse.

Q. Did you have a clock?
A. No, sir.
Q. Could you tell the time of day?
A. I think it was between 9 and 10 o'clock when he came there.
Q. Where did he go from there?
A. He went north from there.
Q. Do you know a man named Joe Roach who is a witness here?
A. Yes, sir.
Q. How close together do you live?
A. Pretty near a mile north of where I live.
Q. State whether or not when the defendant left he went in the direction of Raoch's on that Friday he was there.
A. Yes, sir.
Q. What direction did he come from when he come to your house?
A. He come from the south.
Q. Do you know where Claremore is?
A. Yes, sir.
146 Q. State whether or not he came from the direction of Claremore.
A. That would be the road from Claremore.
Q. How long did he stay?
A. I don't know just how long.
Q. Do you remember of his ever being at your house at any other time in the daytime?
A. No, sir; that is all the time he was ever at my house in the daytime?
Q. Do you remember what kind of a hat he wore then?
A. I think he had on a little white hat, if I am not mistaken.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You don't know what month that was, do you?
A. No, sir; I am not certain.
Q. Was it in the fall or in the summer, like?
A. It was in the fall.
Q. You don't know whether it was before or after the Lenapah robbery?
A. No, sir; I don't.
Q. And you don't really know it was on Friday?
A. Yes, sir; I am certain it was on Friday.
Q. I thought you said awhile ago you thought it was on Friday?
A. No, I am certain it was.
Q. How do you know it?
A. Because it was the only time he was ever at my house in the daytime.
Q. That is not a reason. How do you know it was Friday?
A. That is all the reason I have. That is the only time he was at my house in the daytime.
Q. Has it been his custom to visit your house in the night time?
147 A. He came there once before that just a little after sundown.
Q. When was that?
A. I don't remember, but it was three or four weeks before that.
Q. Anybody with him at that time?
A. No, sir.

Q. What did he come there for?
A. I don't know.
Q. What did he say he come for?
A. He said he wanted feed for his horse.
Q. Did he get it?
A. Yes, sir.
Q. Did he get something to eat himself?
A. No, sir.
Q. How long did he stay?
A. Just long enough for his horse to eat.
Q. Was that on Friday?
A. No, sir; I don't know what day of the week it was on.
Q. Why don't you know? That was the only time he was there in the nighttime, was it?
A. No, sir.
Q. Had he been there before that in the night?
A. He came there once after that in the night.
Q. What time did he come that night?
A. I don't know. I had been to bed and it was away in the night.
Q. Was there anybody with him?
A. No, sir.
Q. Was that after this time he was there on Friday the second night?
A. Yes, sir.
Q. What day of the week was that that he came in the night?
A. I don't remember.
Q. Why?
A. I don't remember what day of the week it was.
Q. When he came to your house in the night was it after 12 o'clock in the night that he was there?
A. I could not tell you.
148 Q. Was that about the time of the Lenapah robbery that he was there in the nighttime?
A. I don't remember.
Q. Didn't you hear of the Lenapah robbery a short time after that, five or six days after that?
A. I don't remember exactly when I heard it.
Q. Isn't that your information, that you heard of the Lenapah robbery a week or ten days or a short time after that?
A. I could not say.
Q. It was after that, wasn't it?
A. I don't know whether it was after that or before?
Q. You don't know whether you heard of the Lenapah robbery before or after he was there in the nighttime?
A. No, sir.
Q. Was there anybody with him that time?
A. No, sir.
Q. Where had he come from?
A. I never asked him.
Q. Now, at the time he came to your house on the road from Claremore, he would be coming from the general direction of Lenapah, wouldn't he? Would it be any out of the way to come by Claremore to your house from Lenapah?

A. Yes, sir; it would be right smart out of the way, I think.
Q. Were you ever at Claremore?
A. Yes, sir.
Q. Were you ever at Lenapah?
A. Yes, sir.
Q. Have you ever travelled horseback from Lenapah to your house?
A. Yes, sir.
Q. How far do you miss Claremore?
A. I could not tell you.
Q. What is your opinion about it?
A. I could not tell you about hoe far.
Q. Have you any opinion at all?
A. No, sir.
Q. You would miss Claremore 10 miles, would you?
A. I can not say.
149 Q. Do you go by Oolagah in going from Lenapah to your place?
A. No, sir.
Q. By Talala?
A. No, sir.
Q. Watova?
A. No, sir.
Q. Nowata?
A. No, sir.
Q. Sequoyah?
A. Where Carter's Ferry used to be, I think it is called Sequoyah; I am not certain.
Q. Do you go by Skiatook?
A. No, sir; leave Skiatook to my left.
Q. You went about as far out of the way going that way as you would in going around by Claremore, wouldn't you?
A. I do not know, sir; I never went that way.
Q. You don't know whether it is nearer to go by way of Claremore, or to go the way you went?
A. I could not say. I never went that way.
Q. Did you go with the defendant away from your home?
A. No, sir.
Q. Neither of these times?
A. No, sir.
Q. Did he stay all night with you either time?
A. No, sir.
Q. What was he doing coming to your house?
A. He come there the first time and said he wanted to feed his horse. I didn't know what he wanted besides that.
Q. What time in the day was he there that he was there in the daytime?
A. I judge it was between 9 and 10 o'clock.
Q. In the morning?
A. Yes, sir.
Q. Was that in September?
A. I think it was later than September.

Q. In October?

A. I could not say for certain whether it was October or not.

150 Q. Is it not your best judgment it was in October?

A. I could not say exactly.

Q. Was it as late as November?

A. I could not tell you just exactly what time it was, what month.

Q. Can you give any opinion as to the time?

A. Well, sir; all I know about it, a week after that fight at Frank Daniels', he was there.

Q. Where is that?

A. On Caney, close to Sequoyah.

Q. A week after that fight, was it?

A. Yes, sir.

Q. Who had the fight?

A. The defendant and the marshals.

Q. You don't know when that was?

A. No, sir.

The COURT. How do you know it was a week after that if you don't know when it was? How do you remember it?

A. Because I heard it on Sunday, and the next Friday he came to my house.

Redirect-examination by Mr. THOMAS H. BARNES:

Q. If Sequoyah was where Carter's Ferry was, then you went by Sequoyah on that route to Lenapah, didn't you?

A. Yes, sir.

Q. I suppose you aimed to travel the most direct route?

A. I went the straightest way I knew.

Recross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You are no akin to the defendant, are you?

A. No, sir.

Q. I will ask you if you don't recollect that the fight that the defendant had with the marshals was on the 16th of November?

A. I could not tell you what date it was.

151 Q. Anyway, it was a week after that that he was at your place?

A. Yes, sir.

Q. I will ask you if you didn't see on the defendant on one of these times he was there one of these clippers you cut wire fen'es with—that you cut wire with, and that a man can cut a wire fence and go right straight through?

A. No, sir; I do not remember noticing that.

Redirect examination by Mr. J. WARREN REED:

Q. They had several fights about that time, didn't they?

A. I don't know, sir.

The COURT. He designated this fight at Frank Daniels. (To the witness.) That is what you said, is it not?

A. Yes, sir.

Mr. J. WARREN REED. How many fights did you hear of about that time?

A. That is all the one I heard of at that time.

Q. Did you hear of some before or some after that?
A. Not that I remember of.
(Witness excused.)

152 SAMUEL CANDY, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. What is your name?
Answer. Samuel Candy.
Q. Where do you live?
A. Three miles south of Claremore.
Q. How long have you lived there?
A. About 6 years.
Q. Have you ever seen this defendant here?
A. I saw him once.
Q. Now, tell the jury where you saw him.
A. Well, I had been hog hunting one day and I overtaken him right down still south of my house, and he was riding up the other road the way towards Claremore.
Q. What road was it you saw him on?
A. It was—I don't know.
Q. Do you know where Cochrans live?
A. Yes, sir; the road what he was travelling run right by Cochran's.
Q. Do you know where Tulsa is in the Creek Nation?
A. Yes, sir.
Q. State whether or not that road you saw him travelling on at that time would go in the direction of Tulsa.
A. Well, just the other side of where me and him rode together the roads fork, and the left-hand intersected with the Tulsa road.
Q. What time of day was it, do you know?
A. It was in before noon.
Q. You can't tell what time?
A. No, sir.
Q. He was on the road that would go towards Tulsa?
A. Yes, sir.
Q. How far did you ride with him?
A. About a mile and a half.
153 Q. Had you seen him before?
A. No, sir; I just suspected it was him from descriptions people had given me of him, you know, and I just suspected it was him by him being armed the way he was.
Q. You suspected it was who?
A. Cherokee Bill.
Q. For the reasons you have given you observed him?
A. Yes, sir.
Q. Did you learn of the robbery at Lenapah, where a man was killed after that?
A. Well, yes, I think maybe it was the next morning, or the next evening, I don't remember which, I went up to Judge Scrimsher's and heard it.
Q. How far does Judge Schrimsher live from Claremore?

A. He lives about three miles.

Q. When did you learn it had occurred?

The ASSISTANT DISTRICT ATTORNEY. I submit that is not competent.

Mr. J. WARREN REED (of counsel for defendant.) That is, when he learned it, at what time he learned it had occurred.

The ASSISTANT DISTRICT ATTORNEY. Very well, go ahead.

Mr. J. WARREN REED (of counsel for defendant). When did you learn that the robbery had occurred?

The ASSISTANT DISTRICT ATTORNEY. That is, what did Scrimsher tell you as to the time.

The WITNESS. It was his daughter that told me. She told me it had occurred the day before.

Mr. J. WARREN REED (of counsel for defendant). Was it the day before she was telling you of this that you had seen this man?

A. Yes, sir; I think the day before that was the day that him and me rode together.

154 Q. Do you remember the day of the week it was on that you heard of the robbery, that you learned of it?

A. No, sir; I don't remember that.

Q. Did you look at him pretty good?

A. Yes, sir.

Q. Could you remember the kind of hat he wore?

A. Yes, sir.

Q. What color was it?

A. Well, he had on a white hat. It was an old hat, and it was kind of flapped down; the brim was not as wide as mine, the hat he had on that day.

Q. Do you remember how he was dressed?

A. Well, the best I recollect about it, he had on kind of a brown check coat, but as to his pants, I can't describe them.

Q. Could you describe his horse?

A. No, sir.

Q. How much arms did he have?

A. I just noticed one six-shooter and one Winchester.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Did you notice the size of the Winchester?

A. No, sir; I just judged it was about a .44; I don't know.

Q. Did you ever see the 'efendant after that until you saw him here?

A. No, sir.

Q. And you had never seen him before?

A. No, sir.

Q. And you recognize him?

A. Yes, sir.

Q. Judge Scrimsher's daughter told you that she heard that the robbery occurred the day before?

A. Yes, sir.

Q. You don't know whether her information was correct or not, do you?

A. No, sir.

155 Q. And you don't know how far down towards Tulsa the defendant had been on the day you saw him, do you? You don't

know whether he had just turned back immediately before you saw him and was making back the other way or not?

A. No, I never asked him where he had come from.

Q. If you had asked him you don't know whether what he would have told you would have been true; you would not know it unless you saw it yourself?

A. No, sir.

Q. Therefore you don't know how far down towards Tulsa he had been?

A. No, sir.

Q. You don't remember the day of the week upon which you saw him?

A. No, sir.

Q. And you don't know the day of the week upon which Judge Scrimisher's daughter told you of the robbery?

A. No, sir.

Q. You don't know how long after the robbery it was that you saw the defendant, whether it was ten days or two weeks?

A. It was before the robbery, I think, when I saw him; about the robbery.

Q. You don't know, do you?

A. Well, all I can go by is what Scrimisher's daughter told me.

Q. You just stated you didn't know whether her information was correct or not. Now, independent of that, on your own recollection, your own judgment, you don't know what day of the month was it, do you?

A. No, sir.

Q. Was it in November or September?

A. November.

Q. What time in November you don't know, do you?

A. No, sir; I don't recollect.

Q. Then you don't know whether it was before or after the robbery that you saw him, of your own knowledge—not what Judge
156 Scrimisher's daughter told you, but of your own knowledge? Do you know where the robbery occurred, of your own knowledge?

A. No, sir.

Q. You were not present at the robbery?

A. No, sir.

Q. Then you don't know when the robbery occurred, and you don't know on what day you saw him. You don't know whether it was before or after the robbery, do you? If you can reason that out you can beat anybody I ever saw. You know don't when the robbery occurred, you don't know what day it was you saw him, you don't know the day of the month you saw him, and therefore you don't know whether it was before or after the robbery that you did see him?

A. No, sir; I don't know what day of the month it was.

Q. Then you can't know whether it was before or after the robbery you saw him?

A. To my best knowledge I could not tell you to-day what day the robbery was.

Redirect examination by Mr. J. WARREN REED:

Q. Mr. McDonough asked you that you didn't know whether the man had come from Tulsa, or where he had come from. What direction was

he going when you saw him? Was he going on the road that would lead to Tulsa?

A. He was travelling up towards Claremore, but just the other side of there the roads fork. The left hand would have intersected with the Tulsa road.

Q. Do you know the distance from Tulsa to Claremore?

A. No, sir; I do not.

157 Recross examination by the ASSISTANT DISTRICT ATTORNEY.

Q. Did you ride with him beyond that fork of the road?

A. No, sir.

Q. You left him before you reached that fork of the road?

A. Yes, sir.

Q. You don't know whether he turned in the direction of Tulsa or went on in the direction of Claremore?

A. No, sir.

Q. Did you go to Claremore?

A. No, sir; I went home.

Q. How far from your place was it you saw him?

A. The road runs along in about 2 or 300 yards of my place.

Q. South of your place?

A. No, sir; east of my place.

Q. I am asking you how far south of your place was it when you saw this defendant.

A. Well, I overtaken him about a mile and a half south of me.

(Witness excused.)

158 Mrs. LENA COCHRAN, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live when you are at home?

Answer. About six miles southeast of Claremore.

Q. Have you ever lived in Ft. Smith?

A. Yes, sir.

Q. Where were you raised?

A. In Ft. Smith.

Q. You went to the Indian country after you got married?

A. Yes, sir.

Q. Do you remember of hearing of the Lenapah robbery, where a man was killed last November?

A. Yes, sir.

Q. With reference to that time, did you see this defendant here?

A. No, sir; I didn't see him at the time I heard of it.

Q. Before you heard of it did you see him?

A. Yes, sir; he stopped at my house.

Q. Have you seen him here?

A. I saw him at the jail this morning.

Q. You know where Ft. Gibson is?

A. Yes, sir.

Q. With reference to Ft. Gibson and Claremore, as to whether or not that would be between Gibson and Claremore, where you live?

A. Yes, sir; it is.

Q. Do you know where Judge Schrimsher lives?

A. Yes, sir.

Q. Do you know where Tulsa is, the direction is?

A. No, sir; I have never been any further up than Claremore.

Q. When was this man at your house?

A. It was in November, but I don't remember the date or the day.

Q. What time did he come there?

159 A. In the evening; I don't know the exact time it was, but it was in the evening.

Q. How long did he stay?

A. All night. He left the next morning.

Q. What direction did he go?

A. Towards Claremore.

Q. When did you hear of the robbery?

A. On the Saturday following after the robbery was done at Lenapah.

Q. With reference to the time you heard of the robbery, when had the man staid at your house?

A. A day or two before; I could not say just when, for I could not remember.

Q. When you heard it on Saturday when did you hear that it had occurred?

A. Friday, the day before.

Q. Do you know this defendant to be the same man?

A. I do.

Q. You say you picked him out over here in the jail?

A. Yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Had you ever seen him before that?

A. No, sir.

Q. You never saw him since then until here?

A. At a distance I did.

Q. When?

A. Well, it was about the time he was wounded.

Q. Where was he wounded?

A. I suppose—I don't know for sure it is the same man, but then they pointed him out to me.

Q. Who pointed him out?

A. Loenard Rose.

Q. Where was it when you saw him? At your house?

A. No, sir.

Q. Where?

A. On the prairie. He wasn't in anyone's house.

Q. On what prairie?

A. On the prairie I live on.

Q. How far from your house?

160 A. About a quarter of a mile, or hardly so far.

Q. What were you doing out there?

A. Visiting.

Q. How come you to see him?

A. They pointed him out. They says, "There goes the men that Heck Thomas wounded the other day." And I said, "Who?"

Q. Do you refer to the Daniels fight?

A. Well, now, I could not say that.

Q. Where was it he was wounded?

A. It was up above me somewhere, but I don't know.

Q. Then you don't know whether this was the one you saw at that time or not?

A. No, sir; I would not say, only just what they told me.

Q. The only time you saw him was when he stopped at your house?

A. Yes, sir.

Q. And you didn't see him after that until you saw him here, and this is the man?

A. Yes, sir.

Q. I will ask you if he didn't stay at your house on Thursday night, all night at your house, of that week?

A. I could not say.

Q. Is it not your best judgment that he staid Wednesday or Thursday night of that week there?

A. It was something about that time, but I don't know. It was just a day or two before——

Q. Was your husband engaged with him in any of these raids up there?

A. No, sir.

Q. Your husband was killed?

A. Yes, sir.

Q. He was with the robbers when he was killed?

A. Yes, sir.

Q. He was with them?

A. He was with Jim French, so they said.

Q. With him when he was killed?

A. Yes, sir.

Q. How long had he been with Jim French?

161 A. I don't know; I never saw Jim French.

Q. How long had he been with Jim French?

A. I don't know. I never s'en Jim French.

Q. Was Jim French with the defendant when he staid at your house?

A. No, sir.

Q. Was there anybody with him?

A. No, sir.

Q. You never did see Jim French?

A. I saw him here when he was tried here in Ft. Smith, and not since that I know of.

Redirect examination by Mr. J. WARREN REED:

You were asked about your husband being with Jim French. I want to know if that wasn't the first time he was ever with Jim French that you know anything about?

A. Yes, sir.

Q. Or how he come to be with him?

A. No, sir.

Q. Or whether it was by accident he got killed?

A. No, sir; I don't know. My husband left home about 4 o'clock. I was with him all day.

The COURT. How far was he killed from your house?

A. About 8 miles, they say. I have never been at Catoosa and I can't say.

The ASSISTANT DISTRICT ATTORNEY. Do you know how far Jim French had travelled that day?

A. No, sir; I don't know anything about it.

Q. You don't know that he travelled about 80 miles?

A. I don't know; I never saw him.

Mr. J. WARREN REED (of counsel for defendant). Do you know a man named Joe Nave?

A. Yes, sir.

162 Q. Do you know whether he was at your house that morning?

A. I think he was. He was at my house almost every day. He hauled water by there.

Q. That is the same morning this man left there you think he was there?

A. Yes, sir.

(Witness excused.)

163 JOE NAVE, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. I live up in Coo-wee-scoo-wee district, about six miles or seven this side of Claremore.

Q. Between Claremore and Gibson?

A. Between Claremore and Ionola.

Q. Would that be on the road from Gibson?

A. Yes, sir.

Q. Have you seen this man they call Cherokee Bill.

A. I have saw him two or three times.

Q. Do you remember seeing him last November at Mrs. Cochran's?

A. Yes, sir; I saw him there once.

Q. What time of day was it?

A. It was in the morning.

Q. Do you know where he went from there?

A. No, sir.

Q. Do you know how long he had been there?

A. No, sir.

Q. Where was he when you saw him?

A. Was at the house.

Q. Do you know if he had staid there all night that night?

A. I don't know; I saw him there in the morning.

Q. Did you hear of a robbery up there after that?

A. It was after that, but it was a day or two or three days after that. I went to Tahlequa hand I heard of it there.

Q. You can't remember the date when it was?

A. No, sir.

(Cross-examination waived. Witness excused.)

164 BERT GRAY, being recalled, was reexamined by J. Warren Reed, esq., and testified as follows, to wit:

Question. We showed you a hat yesterday. Take this hat, and see whether or not you know whether that is the hat you sold the defendant; whether it has any mark on it by which you can tell it.

The ASSISTANT DISTRICT ATTORNEY. Is that the one he examined yesterday?

Mr. J. WARREN REED (of counsel for defendant). No, sir.

(The witness examines hat.)

Mr. J. WARREN REED (of counsel for defendant). We thought the defendant had his ow' hat, but we find out that when they brought him here he picked up the hat of another man.

The WITNESS. I believe that is the hat. At least, we handle that brand of hats.

Q. Do you find the brand of hat you carried in that hat?

A. Yes, sir; "Clear Neutral." It is a beaver, five-dollar hat, and we handle the same hat.

Q. State whether or not you believe that to be the same hat.

A. I think it is; at least we handle that hat, and I sold him that kind of a hat.

(Hat is shown to the jury by defendant's counsel.)

Q. That is the hat, I believe, you stated you sold on the 17th day of December?

A. Yes, sir; that hat or one just like it.

(Witness excused.)

165 JAMES TURLEY, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. I live five miles north of Tylsa.

The ASSISTANT DISTRICT ATTORNEY. I find from the character of some of this testimony it will be necessary for me to use Mr. Heck Thomas as a witness.

The COURT. He had better keep out of the room then—that is, if the gentlemen object to his staying in here.

The ASSISTANT DISTRICT ATTORNEY. Do you object to his staying in the room?

Mr. THOMAS H. BARNES (of counsel for defendant). No; but I can say to you we have had no notice of Mr. Thomas in the world.

The ASSISTANT DISTRICT ATTORNEY. No, sir; none in the world, because I didn't have any notice of the testimony you have introduced.

Mr. THOMAS H. BARNES (of counsel for defendant). We shall object to all the witnesses we have had no notice of.

(Here the court directed Mr. Thomas to retire.)

Mr. J. WARREN REED (of counsel for defendant). Where do you live?

A. I live on Flat Rock.

Q. How far from Tulsa?

A. Five miles north, about.

Q. Due north?

A. No; a little northeast, I think.

Q. Do you know this defendant when you see him?

A. Yes, sir.

Q. State whether or not he was at your house on the first of last November, and give the circumstances, if he was there.

A. Yes; he was at my house.

166 Q. Do you remember the time of day the defendant came there?

A. I should judge it was about 9 or 10 o'clock in the forenoon.

Q. How long did he stay there?

A. A couple of hours, I expect.

Q. When he left there, what direction did he go?

A. He started off like he was going—I don't know which way he went—he went down to the creek, and after he got there I don't know where he went, because there was timber there.

Q. What direction did he come from?

A. He come from the same direction. He come up from the east, like he would come home from Tulsa. That is the way I come from Tulsa, I mean.

Q. He came as though he had come from Tulsa?

A. Yes, sir; that is, the road he come is the one I come when I come home from Tulsa.

Q. Do you know where Joe Roach lives?

A. Yes, sir.

Q. Would he have come that road from Joe Roach's?

A. Yes, sir.

Q. What direction did he go when he left there?

A. He left the same direction that he came. In fact, he had to go out that way; there was no other way to go.

Q. He had to go out the way he came in?

A. Yes, sir.

Q. That is the way your farm was situated, was it?

A. Yes, sir.

Q. Can you locate the time when that was by any circumstance, and the day of the week it was on?

A. No, sir; I can't. It was before the second Monday in November, on account I had loaned a fellow a saddle of mine to go down to Tahlequah with, and Bill told me if I let him take it, somebody would take it before he ever got back with it; and so I wouldn't let him have the saddle.

167 Q. You mean it was before the second Monday of November?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. That would be the 12th; the second Monday was on the 12th.

Mr. J. WARREN REED (of counsel for defendant). How long before the second Monday?

A. I don't know the days. Two or three days or such a matter.

Q. Give the circumstances; did you go to counsel?

A. I didn't go, and neither did that boy that took the saddle—the one I took it from. My wife went.

Q. You took your wife?

A. No, sir; she went herself. I didn't go. I took her to coal switch to put her on the train. And she went to Claremore and staid all night there and the next morning—no, I think she went as far as Wagoner that day.

Q. What day did you take your wife to start to counsel?

A. I believe she started on Monday, if I am not mistaken.

Q. Do you know the day that counsel sat?

A. I think it sits on the first Monday of November.

Q. Now, it was some days before this second Monday of November that you took your wife away that this defendant was there?

A. Yes, sir.

Q. Now, how many days, if you can locate the time, what you done, and fix the time as near as you can—state when you saw him and what you may have done after that, and locate it as near as you can before your wife went away?

A. I was gathering corn. I suppose I was, but I could not call the exact day.

Q. According to your best recollection how many days was it before your wife went away?

168 A. It must have been two or three days. I don't remember exactly.

Q. What did you do the Saturday before that?

A. I was gathering corn then. I didn't intend to do anything else.

Q. Was it before that that he was there, before the day that you gathered corn, before Saturday?

A. I don't remember.

Q. The most you can say is it was a few days before that. Two or three days before the time that your wife went away, and she went away on Monday to council?

A. Yes, sir.

Q. Do you remember what kind of a hat he wore?

A. I believe he had on a little white hat, something like mine, only not quite so big; but then I could not say for sure. I don't remember. I never paid much attention to his clothes.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Do you know about the officer's getting his hat in the Frank Daniels fight, and it was a black hat?

A. Heck Bruner told me about getting a hat out there on Caney.

Q. Did you see the hat?

A. No, sir.

Q. You don't know anything about it except what they told you?

A. No, sir.

Q. Did the defendant tell you anything about losing his hat there in the Frank Daniels fight?

A. I don't remember as he ever did.

Q. You have seen him wearing a black hat, haven't you?

A. I have seen him have on different hats.

Q. He wore one hat one day, and another day a different kind of a hat?

169 A. I don't know that he made that regular change, but I noticed with a white hat on different times.

Q. You saw him have black hats, too?

A. Yes, sir.

Q. Did you see him with a new hat that he got in December?

A. He had a new black hat, and I think he is wearing that now.

Q. You don't know what kind of a hat he was wearing when they had that fight with him?

A. No, sir; I don't.

Q. What was he doing at your house?

A. He stopped there to feed his horse and get something to eat.

Q. How come him to stop at your house?

A. I had known him some time, and I suppose he stopped th'ough old friendship; I don't kn'w what else.

Q. You were a friend of his?

A. Yes, sir; I used to be; I used to think right smart of him when I got acquainted with him first.

Q. Did he live there with you?

A. Yes, sir; he used to live at the same place on a farm.

Q. Was there anybody with him there? Did Jim French ever come there with him?

A. No, sir; never come to my house.

Q. Did you ever see Jim French with him?

A. No, sir.

Q. Was there anybody there with him when he was there at your place?

A. The last time he was there I think he was by himself.

Q. Was there anybody with him before that?

A. He come there with Bill Cook and Skeeter once.

Q. Anybody else?

A. No, sir.

Q. At any other time did he come with anybody else?

A. Yes, sir; he come there with a boy once; kind of a young, light feilow; looked like a white boy.

170 Q. Who was that?

A. They called him the Verdigris Kid, I think.

Q. About how old was he?

A. I don't know; he looked like he might be about 18 or 20.

Q. When was that?

A. That was the time after they had that fight up on Caney with Heck Bruner and them fellows.

Q. About how long afterwards?

A. It was two or three days, I think; the boys came down through the field and run on to me; I didn't pay any attention to the dates.

Q. You don't know whether the man they called the Verdigris Kid was a white man or an Indian?

A. I have heard he was an Indian; I don't know whether he was or not, but he looked rather white.

Q. But he might be taken for an Indian?

A. No, sir; I never taken him for one.

(Witness excused.)

171 Counsel for defendant request and obtain permission to consult with Government witnesses.

Mr. J. WARREN REED (of counsel for defendant). If the court please, there are three or four Government witnesses here who have not been placed on the stand. We would like to ask the privilege of the court and gentleman on the other side to have a little opportunity to interview with them.

The ASSISTANT DISTRICT ATTORNEY. I would like to know who they are?

Mr. J. WARREN REED (of counsel for defendant). There is Swoop and Robert Hall, I think it is, and some people by the name of Harris—Minerva Harris and her husband.

The ASSISTANT DISTRICT ATTORNEY. I have no sort of an objection to it.

The COURT. We will give you a few minutes.

Whereupon a short recess was taken.

172 Mr. ADRIAN SWOPE, having been duly sworn, was called upon behalf of the defendant, examined in chief by Mr. J. Warren Reed, and testified as follows, to wit:

Question. Where do you live?

Answer. Lenapah, Indian Territory.

Q. How long have you lived there?

A. *Growing* on two years.

Q. Do you know Mr. John Schufeldt?

A. Yes, sir.

Q. I believe you were brought here as a witness on the Government side of this case?

A. Yes, sir.

Q. How long have you known Mr. Schufeldt?

A. *Growing* on three years. I was in the Territory and staid one year, and then went back to Missouri and staid, and then come back, and have staid there two years.

Q. Were you at Lenapah at the time of the robbery?

A. Yes, sir; I was in town.

Q. That is, at the time of this robbery and killing of Mr. Melton last November?

A. Yes, sir.

Q. State whether or not you heard Mr. John Schufeldt make any statement with regard to the description or describing the two men that robbed him.

The ASSISTANT DISTRICT ATTORNEY. No foundation was laid for this.

Mr. J. WARREN REED (of counsel for defendant). I certainly used this man's name, but I will recall Mr. Schufeldt now.

(Witness excused, temporarily.)

173 JOHN SCHUFELDT, being recalled by the defense for further cross-examination, was examined by J. Warren Reed, esq., and testified as follows, to wit:

Question. State whether or not in describing these men you claim robbed you there at your store you described them, one as a white man, and the other as an Indian, soon after the robbery, the same or the next day?

A. If I described them at all I described one as a white man, and the other as a Creek negro.

Q. Didn't you describe them as a white man and an Indian in the presence of Mr. Adrain Swope?

A. No, sir; I don't think I did.

Q. And the Indian being a smaller man?

A. No, sir.

(Witness excused.)

174 ADRIAN SWOPE, being recalled, was examined by J. W. Reed, esq., and testified as follows, to wit:

Question. If you heard a statement made by Mr. John Schufeldt giving a description of these men, state it to the jury?

Answer. Well, I was there, I rode in town just as they were leaving, and they told me. I went in the store where the dead man was, and then I went into Schufeldt's store. I went to the little restaurant where the man was laying dead. He was laying there with his hands in his pockets, I think, and they picked him up, and I went to Schufeldt's store, and they said it was a white man, and an Indian that done the robbing.

Q. Who said it?

A. Bill Bell and John Schufeldt.

Q. Which one did Schufeldt describe as the Indian?

A. The man that staid on the outside, the little fellow they called him.

Q. The one that was in the inside they said was a white man?

A. Yes, sir.

Cross-examination; the ASSISTANT DISTRICT ATTORNEY:

Q. That is what you recollect about it?

A. Yes, sir.

Q. You don' know whether that is his description or not, do you?

A. Why, no; I could not swear——

Q. No; didn't he tell you that the man that robbed them on the inside was a Creek negro?

A. No, sir; I didn't say that.

(Witness excused.)

175 ROBERT HARRIS, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. J. Warren Reed, and testified as follows, to wit:

The ASSISTANT DISTRICT ATTORNEY. Have you been sworn?

The WITNESS. No, sir.

(Witness here sworn.)

Mr. J. WARREN REED (of counsel for defendant). Where do you live?

A. I live near Lenapah.

Q. How long have you lived there?

A. About two years in March.

Q. Were you in Lenapah the day that Schufeldt's store was robbed there, and Mr. Melton was killed?

A. Yes, sir.

Q. Did you see the men who did the robbing?

A. Yes, sir.

Q. Now just go to work and give the circumstances of how it was, and what you saw, and a description of the men.

A. I could not describe only one of them.

Q. You are a Government witness, I believe?

A. Yes, sir.

Q. Subpœnaed here by the Government?

A. Yes, sir. I could not describe only one of them. One of them was a small man; I would take him to weigh between 130 and 140 pounds somewhere; and the other one I could not say as to that.

Q. Now describe where they stood—the man you speak of having seen, the small one. What part of the robbery did he play?

A. He was on the outside of the building—out in front.

Q. How close were you to him?

A. I was in 20 feet of him, I should judge.

Q. What was he as to being a white man or colored, or Indian, or what?

A. I would take him to be a half Cherokee.

176 Q. Was the man on the outside this defendant here?

A. No, sir.

Q. What did you see of the other one?

A. I never saw him until as he went off from the building.

Q. Did you see enough of him to give any description of him?

A. No, sir; I didn't.

Q. With regard to the other man, as to size, how was he, or could you tell?

A. Well, he was considerably larger than the one that was on the outside.

Q. That is all you could tell?

A. Yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. In your judgment, isn't this defendant the other man?

A. Well, sir, I could not say whether he was or not.

A JUROR. Did you notice how he wore the belt, or did you notice the belt at all?

A. I could not see any belt at all; I did not see any belt on the man?

Mr. J. WARREN REED (of counsel for defendant). You didn't see any belt on the man that was inside?

A. No, sir.

(Witness excused.)

177 TOM HARRISON, having been duly sworn, was called on behalf of the defendant, examined in chief by Mr. J. Warren Reed, and testified as follows, to wit:

Question. Were you sworn?

Answer. Yes, sir.

Q. Sworn with the Government witnesses?

The ASSISTANT DISTRICT ATTORNEY. I have never seen you. I suppose you are a Government witness, though.

Mr. J. WARREN REED (of counsel for defendant). Where do you live?

A. I live in Wagoner.

Q. Is your name Harris or Harrison?

A. Harrison. They call me Harris or Harrison, either one.

The ASSISTANT DISTRICT ATTORNEY. I don't know whether you are a Government witness or not. I sent for Tom Harris. But go ahead.

Mr. J. WARREN REED (of counsel for defendant). Were you at Lenapah the day that Schufeldt's store was robbed and Mr. Melton was killed?

A. Yes, sir; I was a little this side of there at that time?

Q. What do you mean by "this side"?

A. I was two or three miles outside when that happened.

Q. That would be towards your home of Wagoner where you lived.

A. Yes, sir.

Q. What course would that be?

A. South.

Q. South from the town?

A. Yes, sir.

Q. You were coming from the south towards Lenapah?

A. Yes, sir.

178 Q. Did you see the men who did the robbing at Schufeldt's?

A. I don't know. There was a couple of men passed by me in a sweeping lope, going in that direction.

Q. Just describe how they went.

A. They were loping along right due northwest.

Q. Where were you; going south?

A. Going north.

Q. Going into Lenapah?

A. Yes, sir.

Q. Did they pass you?

A. Yes, sir.

Q. How close to you?

A. One of them passed in 8 feet and the other about 12 feet, I guess, from me.

Q. Right close to you?

A. Yes, sir.

Q. How were you going?

A. I was in a wagon.

Q. They went on towards Lenapah?

A. Yes, sir.

Q. What time of day was that?

A. It must have been near 12 o'clock.

Q. Did you see the same men afterwards?

A. Well, I saw two men coming back of the same description. They turned off, I guess, about 150 or 200 yards from where we were, before they got to us, and they went due west.

Q. When they turned off how near were you to town?

A. I guess about a mile, I reckon.

Q. Were they or not the same men that had passed you?

A. I don't know.

Q. Did you take them to be?

A. I took them to be the same horses. One was a blad-face horse, and one was a bay and bald face. I took them to be the same men.

Q. And you saw them coming from Lenapah?

A. Yes, sir.

Q. How far could you see them?

179 A. I could see them coming from the edge of town over the hill.

Q. About what gate did they come?

A. Just about like when they passed us.

Q. Describe the men who passed you.

A. Well, it seemed that one was an Indian, as far as I could state, and the other one had light hair. Of course they just passed by me so quick, my wagon had a sheet on, and I never saw them until they got right passed me.

Q. Which side was the dark-colored man on?

A. On the west side.

Q. What kind of a man was he?

A. The littlest man was next to me.

Q. What kind of a looking man was he?

A. He looked like an Indian.

Q. What was the other man; what did he look like?

A. He was a light looking man.

Q. Did he look like a negro or white man?

A. He didn't look like a negro at all; he looked like a white man to me.

Q. That was his appearance?

A. Yes, sir; of course I didn't see them but a minute; I saw the back of his head.

Q. You could see the hair on his head, and the side of his face when he passed?

A. Yes, sir; that is as far as I can judge.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. What kind of a hat did he have on?

A. Really I can't tell you what sort of a hat he had on.

(Witness excused.)

180 GEORGE H. WALSH, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. J. Warren Reed, and testified as follows, to wit:

Question. Where do you live?

Answer. On the Van Buren road, about two miles and a half from here.

Q. Out on the new street-car line, or where it will be?

A. Yes, sir.

Q. Do you know Mrs. Elien Lynch, the defendant's mother?

A. Yes, sir; I don't know whether she is his mother or not. She worked for me down there?

Q. Does she live at your house?

A. Yes, sir.

Q. You have seen her here, have you?

A. Yes, sir.

Q. The same woman?

A. Yes, sir.

Q. State when she left your house and when she went there.

A. She went there the 17th of October and left there about the 25th of November.

Q. Was her husband there?

A. Yes, sir.

Q. State whether you got her mail out of the post-office.

A. Her mail was directed in my care, delivered by the carriers at the office.

Q. You took it out for her?

A. Yes, sir.

Q. Do you remember how many letters you took out for her during the time she was there?

A. Well, on an average one letter a week; sometimes two a week. I took out six or eight letters for her during the time.

181 Q. Where would they come from, do you know?

A. They were from the Territory. I could not say exactly.

The COURT. The letters are the best evidence of that.

Mr. J. WARREN REED (of counsel for defendant). That is so, your honor.

(Witness excused.)

182 JOHN VANN, having been duly sworn upon behalf of the defendant, was examined in chief by J Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. Ft. Gibson.

Q. How long have you lived there?

A. I have been living there all my life.

Q. Did you know Jim French?

A. Yes, sir.

Q. Where was his home?

A. Ft. Gibson.

Q. What size man was he?

A. I don't know. He would weigh about 135 or 140 pounds.

Q. Was he an Indian, and if so, how much?

A. He was about a half-breed Cherokee, I guess.

Q. Are you a Cherokee?

A. Yes, sir.

Q. Do you know the defendant here?

A. Yes, sir.

Q. How long have you known him?

A. Ever since I was big enough to know anybody, I guess.

Q. Was he raised up there at Ft. Gibson?

A. Yes, sir.

Q. Was that his home, where his people lived?

A. Yes, sir.

Q. Do you remember of hearing of the Lenapah robbery at the time Mr. Melton was killed?

A. Yes, sir.

Q. With respect to that time, did you see this defendant before that?

A. Yes, sir.

Q. Where?

A. About a mile from Ft. Gibson.

Q. At what place?

A. Out there by Miller's pasture.

Q. A man they call Frenchy Miller?

A. Yes, sir.

183 Q. What was he doing there?

A. He just came out to where I was at.

Q. How long was that before you heard of this robbery?

A. About three days; two or three; about three.

Q. Do you remember the day of the week you heard of the robbery?

A. Saturday.

Q. Did you hear of it the day it occurred?

A. Yes, sir; I heard it occurred on Friday, I think.

Q. You heard of it the day it is said to have taken place?

A. Yes, sir.

Q. Where did you hear it?

A. Ft. Gibson.

Q. Is there a telegraph office there?

A. Yes, sir.

Q. Was that the day it is said to have occurred?

A. Yes; I guess so.

Q. Do you know whether the defendant was scouting around there at the time you speak of, two or three days before?

A. No, sir.

Q. Do you remember of a man's child dying there by the name of Young?

A. Yes, sir.

Q. State whether it was on the same day that the child was buried you saw him, whatever that might have been.

A. No, sir; I don't remember whether it was the same day that the child was buried or not that I saw him.

Q. Do you remember of there being a funeral there about that time of Mr. Jake Young's child?

A. No, sir.

Q. Do you know Sam McWilliams?

A. Yes, sir.

Q. The fellow they call Verdigris Kid?

A. Yes, sir; I know him by the name of McWilliams. I guess they are the same.

184 Q. How long did you know him?

A. All my life.

Q. How far was he raised from Ft. Gibson?

A. About seven miles of there; up there on the prairie close to Coretta; about three miles from the Verdigris River.

Q. How old is he?

A. I guess he is about 18 or 19 years old.

Q. Has he got a smooth face, or not?

A. Yes, sir.

Q. Does he wear any beard?

A. No, sor; not at all.

Q. What is his complexion?

A. Tolerable fair.

Q. Has he got some Indian in him or not?

A. Yes, sir.

Q. Do you know the color of his hair?

A. I never paid much attention to his hair. I don't know.
Q. You can't remember that?
A. No, sir.
Q. Do you remember if his hair was black or light, or between light and black?
A. No, sir; I don't.
Q. What about his size, as to whether or not he was the size of this man, Cherokee Bill?
A. Yes, sir; he was about that size.
Q. He would be near the size of the defendant here?
A. Yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. How long have you been running with Cherokee Bill?
A. I have not been running with him.
Q. You have been with him some?
A. No, sir.
Q. You have been with Jim French some?
A. No, sir.
Q. You have been with Verdigris Kid some?
A. Only we were boys going to school.
Q. Lately?
A. No, sir.

185 Q. Were you not one of the parties that held up the train at Coretta Switch?
A. No, sir.
Q. Were you not with four or five other men that held up that train?
A. No, sir.
(Witness excused.)

186 Mrs. ELLEN LYNCH, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. Ft. Gibson.
Q. How long have you lived there?
A. I was raised there. I have been living there close to 28 years. I have been back and forth, travelling in the State, but that is my home.
Q. You are the mother of the defendant here?
A. Yes, sir.
Q. How old is he?
A. 19 years old.
Q. Did you hear about Lenapah being robbed up there?
A. Yes, sir; I heard it in the papers.
Q. Where were you living at that time?
A. Here in Ft. Smith, about 2 miles and a half out in the country.
Q. Who did you live with?
A. Mr. George Walch, a real estate man down here on the avenue.
Q. Do you remember how long you lived here with him at that time?
A. About six weeks. I came in October, and I think I leeft the last of November.

Q. Did you receive some letters from home while you were there?

A. Yes, sir.

Q. Do you remember how many?

A. As near as I can judge I think about four; there may have been more. I know I had four letters from home.

Q. Take these letters I now hand you, and see if they are a part of what you received from home.

A. Yes, sir; these are the letters—one from my daughter and the other from my aunty.

Q. Who brought them from the post-office to you?

A. Mr. Walch.

187 Q. What is your daughter's name?

A. Georgia Brown.

Q. What is your aunt's name?

A. Mandy Foster.

Q. Where were they at that time?

A. Ft. Gibson.

Q. One of those letters has an envelope and the other one is gone. State where you found those letters.

A. I found them in my trunk.

Q. You had carried them around with you?

A. Yes, sir.

Q. In your trunk at what place?

A. In the till of the trunk.

Q. When you read them what would you do with them?

A. Sometimes I would put them in the trunk and sometimes in my pocket. If I was in the kitchen I would stick them in my pocket when I was cooking.

Q. When you left Mr. Walch's where did you go?

A. Ft. Gibson.

Q. Did you take your trunk?

A. Yes, sir.

Q. And these letters?

A. Yes, sir.

Q. What did you do with them when you took them home?

A. They were in the trunk, and I didn't take them out until I went back home this last time.

Q. When did you get them this last time?

A. When I went back last Saturday—this last Saturday was a week ago. I came back Tuesday.

Q. How come you to get them?

A. I thought they might do some good in this case. I thought they had some reference to the boy being at home at that time.

Q. This makes two trips you have made down here?

A. Yes, sir.

Q. The first time you were here state whether or not some conversation came up about you being here and getting mail from up there.

(Objected to. Objection sustained.)

188 Q. State whether or not you went home and looked for these letters at my instance.

A. Yes, sir.

Q. When you were at home this last time you hunted up such as you could find. One of them does not seem to have any envelope on it. State why.

A. I never looked for the envelope. I just got the letter. It might be in the trunk now; I don't know whether it is or not. I didn't know the envelope had anything to do with it.

Q. Do you know the handwriting in them?

A. Yes, sir.

Q. Whose is it?

A. My daughter's.

Q. Did she write them both?

A. Yes, sir.

Q. Is she here?

A. Yes, sir.

Q. When did she come?

A. Last Friday.

Q. When did you bring the letters?

A. Last Tuesday.

Q. You brought them before your daughter came?

A. Yes, sir.

(Cross-examination waived. Witness excused.)

189 GEORGIA BROWN, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. J. Warren Reed, and testified as follows, to wit:

Question. Where do you live now?

Answer. Ft. Gibson.

Q. Where were you last November?

A. Ft. Gibson.

Q. What relation are you to the defendant?

A. I am his sister.

Q. How old are you?

A. I will soon be 21; the 18th day of July.

Q. You are older than he is?

A. Yes, sir.

Q. Did you hear of the Lenapah robbery at the time that Mr. Melton was killed?

A. Yes, sir.

Q. At that time where was your mother?

A. At Ft. Smith.

Q. Do you know how long she had been at Ft. Smith?

A. I don't remember the exact time.

Q. Were you writing letters to her at that time?

A. Yes, sir.

Q. Take these letters and see whether you wrote them, whether that is your writing.

A. Yes, sir; I wrote these letters.

Q. Do you know where your brother was on the 8th day of last November?

A. Yes, sir.

Q. Where?

A. He left for my home that morning.
Q. How do you know that?
A. Because I fixed his breakfast for him, and then he requested of me to write and let mama know he was there.
Q. Did you write the letter?
A. I did.
Q. Is that letter there one you wrote?
A. Yes, sir.
Q. What time did you write it?
190 A. I wrote it on the 8th day of November.
Q. When was the other one written?
A. The 22nd day of October.
Q. When he left on the 8th how long had he been there?
A. He came there Tuesday night and eat his supper, and then he went off and staid that night. I give him provision enough to last until the next night, and he came back Wednesday night and eat his supper again at the house. He staid two nights and one day at Ft. Gibson.
Q. What day of the week was it he left?
A. Thursday morning.
Q. And that is the day you wrote the letter?
A. Yes, sir.
Q. That would have been the 8th of November?
A. Yes, sir.
Q. When was he there last before that? You have stated he was there on the 22nd of October, or that he had been there sometime before that.
A. Yes, sir.
Q. You speak of writing another letter. Now, had he been there between these times?
A. No, sir.
Q. Then how long after this morning of the 8th of November was it before he was there again, if he was there after that?
A. As near as I can recollect it was the latter part of November, 22 or 23, I believe. I don't just remember the date.
Q. When he left there on the morning of the 8th of November, at the time you wrote that letter, this Thursday morning you speak of, what kind of a hat did he wear?
A. He wore a little hat with a narrow brim; a white hat like.
Q. Take this hat [referring to white slouch hat with hole in it] and examine it.
A. That is the hat he wore.
Q. Do you know what kind of a coat he wore?
A. He wore a coat with little chekes in it.
191 Q. Take this coat [referring to old coat] and see if you know this coat by anything.
A. I know the coat, because I sewed this button on that morning before he left.
Q. What is that button?
A. It has been a pants button.
Q. Where is the first you saw the coat since you saw him wear it?
A. This is the first time.
Q. When did you see it first since you have been here?

A. I don't know as I have noticed them before. You sent me for the box this morning.

Q. I mean since you came to court, when you saw it fi'st?

A. I see it now, and I don't believe I have seen it before.

Q. Did you see it at my office?

A. I seen the bo*k* that mama, I think, said had the clothes in it.

Q. He wore that hat and that coat when he left?

A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. Do you know what kind of a gun he had then?

A. He had a 3856.

Q. That is, the 8th of November?

A. Yes, sir.

Q. Do you know what kind of a horse he had, or did you see his horse?

A. I saw his horse once after dark, the first night he came to our house.

Q. What color horse was it?

A. It was a dark horse; he did not have a white spot about it in the forehead. It was after dark, but it was a dark horse, something like a bluish gray. It was a real dark horse.

Q. How long had he had that horse?

A. I don't know.

Q. Had you ever seen him with the horse before?

A. I saw him with it up in Coo-wee-scoo-wee district when I went up there. I went up there to sell some hogs after going to Ft.
192 Gibson the first time, between the 22nd of October and November.

Q. Had you lived up there?

A. Yes, sir.

Q. Did you have a place there?

A. I have.

Q. You saw the horse up there?

A. Yes, sir.

Q. How far would that have been from Claremore?

A. It is about 20 miles from Claremore to where I live.

Q. Do you know of there being a funeral up there at that time?

A. Yes, sir.

Q. Whose funeral was it?

A. It was Mr. Jake Young's little boy.

Q. What day did he die on?

A. On the 6th of November.

Q. When was he buried?

A. On the 7th.

Q. Well, how long had he been dead when you wrote that letter?

A. He died Tuesday and was buried Wednesday, and I wrote the letter Thursday, the day after he was buried.

Q. Where was your brother on the day of the funeral?

A. He was in the hills above Ft. Gibson.

Q. Do you know where Frenchy Miller's pasture is up there?

A. Yes, sir.

Q. Was that about where that pasture was?

A. It was right above Ft. Gibson. I don't know where it was exactly, but I know he was in what is called the hills at Gibson.

Q. He hid up there in the hills?

A. Yes, sir.

Q. How far is French Miller's pasture from Gibson?

A. About a quarter of a mile, probably a little over, as near as I can judge.

Q. What time in the morning was he there? Was it in the daytime or before day.

A. It was soon in the morning, before sunup.

193 Q. Was it before day?

A. Yes, sir.

Q. Well, it was after dark when he left. State whether he took anything with him.

A. Yes, sir; he took something to eat.

Q. How did you fix it up?

A. I tied it up in a flour sack for him.

Q. You fixed him up a buadle of provisions?

A. Yes, sir.

Q. How did he carry that?

A. He tied it on his saddle.

At this point a recess was taken until 1.30 p. m.

AFTERNOON SESSION.

Q. Where did you write this letter?

A. At Aunt Mandy Foster's, in the kitchen.

Q. State if that is where you lived at that time.

A. Yes, sir.

Q. At Ft. Gibson?

A. Yes, sir.

Q. Was Aunt Mandy Foster any relation of yours?

A. No blood relation; she was related to me.

Q. There is where you staid?

A. Yes, sir.

(Cross-examination waived. Witness excused.)

194 JACOB B. YOUNG, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. Ft. Gibson, Indian Territory.

Q. How long have you lived there?

A. About 20 years.

Q. State whether you lost a child last November.

A. I had a boy child to die, about 8 years old, on the 6th day of November, 1894.

Q. When was it buried?

A. On the 7th.

Q. You are the Jake Young that had the child die on the 7th?

A. Yes, sir; I am the man. Only colored Young family there is there in town.

(Cross-examination waived. Witness excused.)

195 FRANK BLACKMAN, having been duly sworn upon behalf of the defendants, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. Ft. Gibson.

Q. How long have you lived there?

A. All my life.

Q. Do you know the defendant'?

A. Yes, sir.

Q. Do you remember or not about the burrying of Jake Young's child up there last November?

A. Yes, sir; I don't know exactly the date, but I know of there having a burrying.

Q. Do you know where the defendant was on that day, or if you saw him that day or that night?

A. I saw him late in that evening. I went out in the country apiece after my saddle, and was coming back, and I saw him at out back of Miller's pasture and I spoke to him, and he spoke to me, and he told me to go and tell his brother Clarence where he was at, and I was going by his brother's house anyway, and I went up there and told him that Crawford said to come where he was at.

Q. How long had you know' the defendant?

A. I had been knowing him anyhow about a year and a half.

Q. Now, when had the child been buried?

A. He was buried that day.

Q. At the burying ground at Ft. Gibson?

A. Yes, sir.

(Cross-examination waived. Witness excused.)

196 CLARENCE GOLDSBY, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. You are a brother to the defendant here. Where do you live?

Answer. Ft. Gibson.

Q. How long have you lived there?

A. About 17 years.

Q. How old are you?

A. *17*.

Q. You have lived there ever since you were born, then?

A. Yes, sir.

Q. Do you know where your brother Crawford was on the 8th day of last November, 1894?

A. I don't know where he was exactly that day.

Q. Do you know where he was that morning?

A. That morning before daylight he was at home there, as near as I can remember.

Q. How long had he been there; how many nights?

A. Two.
Q. Where did he stay in the daytime?
A. In the mountains, somewhere; up in the hills there.
Q. State whether or not there is a mountain there right close to Gibson.
A. There is mountains and there is hills all right up in there; a mountain right off about two miles from Gibson.
Q. Where is Grand River from Gibson?
A. The river is right close to town; right along the edge of the mountain.
Q. How far is the Verdigris and Arkansas from there?
A. About two miles and a half.
Q. Where they come together?
A. Yes, sir.
Q. When you talk about the hills, that would be the Grand River hills where he was?
A. Yes, sir.
197 Q. You say he staid there two nights; where was he in the daytime between these two nights?
A. I guess he was up in the mountains, or somewhere around in them hills.
Q. You state that he was there on the morning of the 8th?
A. Yes, sir.
Q. How do you remember that?
A. My sister wrote a letter down here to my mother stating he was there. I could not remember the day.
Q. That was the date of it, that he was there?
A. Yes, sir.
Q. Do you know what become of the letter?
A. My mother has got it if she has not lost it; I guess she can show it to you.
Q. At whose house was the letter written?
A. At Mandy Foster's house.
Q. Who is she?
A. An old lady that raised us boys—raised me.
Q. You were there at that house when your sister wrote it that morning?
A. Yes, sir.
Q. You say your brother was there before daylight that morning; did he get his breakfast there?
A. Yes, sir; before daylight.
Q. Do you know where he went to from there?
A. No, sir; he didn't say where he was going to.
Q. Did he leave there that morning, so far as you know?
A. Yes, sir; he went away that morning.
Q. Who took the letter to the post-office?
A. I did.
Q. You took it yourself?
A. Yes, sir.
Q. Did you take it on that day?
A. Yes, sir.
Q. Where was your mother at that time?
A. Here at Ft. Smith.

Q. Do you remember about Mr. Jake Young's child being buried
198 somewhere near that time?
A. Yes, sir; it was buried on Wednesday.
Q. Were you acquainted with Mr. Young?
A. Yes, sir.
Q. It was buried the day before your brother left the next morning?
A. Yes, sir.
Q. You say he was there and got his breakfast?
A. Yes, sir.
Q. Do you know what kind of a hat he wore at that time?
A. Yes, sir; he wore a white dove hat.
Q. You have seen the hat we have here?
A. Yes, sir.
Q. Is that the hat?
A. That is the hat he had on when I saw him.
Q. Have you seen the coat that I had in my office there?
A. Yes, sir.
Q. Is that the coat?
A. Yes, sir.
Q. Did you see his horse when he was there?
A. I seen the horse, but it was too dark to tell what kind of a horse it was.
Q. Had you seen the horse before?
A. No, sir.
Q. What color horse was it?
A. I don't know; it was dark and I could not see the color.
(Cross-examination waived. Witness excused.)

199 Mrs. ELLEN MCGHEE, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?
Answer. Ft. Gibson.
Q. How long have you lived there?
A. Ever since I was 16 years old, and I am about 45 or 46 now.
Q. Do you know the defendant?
A. Yes, sir; have known him from a child. He was raised up in a little ways of my house, with my children.
Q. Do you know the time he was there last November, about the time Jake Young's child died? Do you remember of its dying?
A. Yes, sir; I do. I remember him being at the house when they buried the child.
Q. The night they buried the child?
A. Yes, sir.
Q. Do you mean they buried the child that day?
A. That day; he was there the night after the burial.
Q. Was he at your house?
A. Yes, sir.
Q. You live there neighbors to the place where he was raised?
A. Yes, sir.

Q. But you don't remember what date that was?

A. I don't know what day of the month it was or nothing, but he was there that night.

(Cross-examination waived. Witness excused.)

200 MANDY FOSTER, having been duly sworn upon behalf of the defendant, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. Ft. Gibson.

Q. How old are you?

A. I will be 67 years old in May.

Q. How long have you lived at Ft. Gibson?

A. Ever since 1865.

Q. Do you know the defendant?

A. I do.

Q. How long have you known him?

A. I raised him from a little boy.

Q. Do you know about his being about your home last November? Do you remember about Jake Young having a child to die?

A. Yes, sir.

Q. Now, if you remember the circumstance, tell the jury about it. I don't know that you can remember the dates?

A. I don't remember dates, but the child died, and of course—I don't know—it seems as though the child was buried, and he was there that night. I believe he was there that night after the child was buried.

Q. The night of the day the child was buried?

A. Yes, sir; I believe it was. Though I don't know the dates, but then he was there.

Q. Do you know if he was there the next morning? Do you know of his coming and getting something to eat?

A. Well, I cooked him something and sent it to him by his sister.

Q. When?

A. The next morning, I believe, afterwards. He was there, I believe, two days.

201 Q. You cooked something there?

A. Yes, sir.

Q. Did he get his breakfast there next morning?

A. Well, it was before day before it was good daylight. It was morning light, but then it was before day.

(Cross-examination waived. Witness excused.)

Defense rests.

202 *Testimony introduced by the Government in rebuttal.*

GEORGE MERRILL, being recalled by the Government for further cross-examination, was examined by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Do you know John Schufeldt?

Answer. Yes, sir.

Q. Did you see him after he had been down here before the grand jury and returned back to Lenapah?

A. Yes, sir.

Q. Did he ask you what you knew about who these parties were, and did you say to him that you were not near enough to know who they were, and didn't know anything about it?

A. No; I never told him that.

Q. You deeny making any statement of that kind to him?

A. Yes, sir.

Q. What did you tell him?

A. He asked me did I know these men, and I told him that I didn't know them.

Q. You told him you didn't know?

A. Yes, sir.

Q. Didn't you deny that until this morning, and didn't you admit this morning you had made such a statement as that to John Schufeldt? You hunted up John Schufeldt to tell him that?

A. I never hunted him up for nothing.

Q. Then you told John Schufeldt you didn't know who it was.

A. Yes, sir; I told him I didn't know who it was.

Q. That wasn't true, was it? Why did you tell him a falsehood about it?

A. Because he wasn't no officer for me to be telling him about who people were.

203 Q. He was simply asking you a question, and what would you tell him a falsehood about it?

A. Because I didn't have to tell him nothing.

Q. Now, on the afternoon, a very short while after the killing and robbery occurred, did you see Ben Vann there in Lenapah?

A. I never saw Ben Vann until that night.

Q. Did you see Bob Gaskins?

A. Yes, sir; he was the first one that told 'e there was a robbery in there.

Q. After the robbery was over did you tell Bann Vann and Gaskin, together or separately, that you were not close enough to tell exactly who the second man was, but one man was Cherokee Bill?

A. No, sir.

Q. And that you thought the other was Jim French?

A. I told them I took the little fellow to be Jim French, but I never told them nothing about the white man, because I didn't know them.

Q. Didn't you tell Gaskins that the large man was Cherokee Bill, Crawford Goldsby?

A. No, sir.

Q. And that the other one you thought was Jim French?

A. No, sir; I never had any talk to this man about that at all.

Q. Did you tell the same thing to Ben Vann?

A. No, sir.

Q. Within an hour after the shooting at Lenapah?

A. Ben never came there in an hour after the shooting; he never came there until just a little before sundown.

Q. You had a talk with him when he did come?

A. Yes, sir.
Q. You told him about the robbery, didn't you?
A. Yes, sir; after he come; there was another man talking about it, and he asked me if I knew who they were.

204 Redirect examination by Mr. J. WARREN REED:

Q. If you told him anything, you can tell now what you did tell him.

A. I never told Ben Vann anything about the robbery, only he asked me what about me knowing them, and I told him I took the smallest one to be Jim French, and the other was a white man, and I didn't know who he was. I never told him anything about Cherokee Bill, for it wasn't him.

Q. I want to know if John Schufeldt has not been prodding every man out in this hall, trying to get them to swear something, if he has not had them backed up against the wall? Has he been talking to you?

A. No, sir; he has not said anything to me since we have been down here.

Q. Have you seen Schufeldt out here talking to other people about the case?

A. Yes, sir; talking to other people.

Q. Witnesses in this case?

A. Yes, sir.

Q. If you have heard John Schufeldt describe these men as to what kind of men they were, tell the jury what he said about it.

A. All that I heard him say about it, he said he taken one to be an Indian, half-breed, and the other was a white man. That is the way I heard him say when I first came in the store after the robbery.

Q. Do you know if Ben Vann is living with Isaac Rogers, the man who captured the defendant here?

A. No, sir.

(Witness excused.)

205 Be it further remembered that after defendant had rested his case the United States in rebuttal offered and examined the following witnesses:

William Gaskins, Ben Vann, Arthur Dodge, Henry Bascomb, Mormon Evarts, Heck Thomas, whose testimony and the exceptions taken thereto by the defendant at the time are in words and figures as follows:

206 WILLIAM GASKINS, having been duly sworn upon behalf of the Government, was called in rebuttal, and being examined in chief by J. B. McDonough, esq., the assistant district attorney, testified as follows, to wit:

Question. What is your name?
Answer. My right name is William Gaskins; they call me Bob.
Q. Do you know George Merril?
A. Yes, sir.
Q. Did you see him in Lenapah soon after the killing and robbery of Schufeldt's store?
A. Yes, sir.

Q. State what he said to you as to who the men were that did the killing and robbery.

A. He said it was Cherokee Bill and Jim French.

Q. Did anybody else hear that statement besides yourself?

A. Ben Vann was there present.

Q. Were you in the restaurant where Melton was killed at the time he was killed?

A. Yes, sir.

Q. Were you near to him?

A. I was standing right in behind him.

Q. Was he doing anything at the time he was killed.

A. No, sir; only looking through the window.

Cross-examination by Mr. J. WARREN REED:

Q. You have been taking a good deal of interest in this case, haven't you?

A. No, sir; I have not.

207 Q. You have been talking with Mr. John Schufeldt a great deal?

A. No, sir; not about the case at all.

Q. You live there about him, don't you?

A. I live a mile east of Lenapah.

Q. You work there for John, don't you?

A. Yes, sir; I have been working for him.

Q. How many years?

A. All the work I have done I haven't worked a year for him.

Q. You trade with him in the store?

A. Yes, sir.

Q. He has kept you for a long time, has he not?

A. No, sir; he don't have to keep me.

Q. You do his chores, and he has looked after you?

A. No, sir.

Q. He has talked to you a great deal since you have been down here?

A. No, sir.

Q. Never spoke to you?

A. Yes, sir; but not about this case.

Q. Before dinner, when I went out in the hall, didn't he have you backed up against the wall, pumping it into you?

A. No, sir.

Q. He was talking to you, wasn't he?

A. Yes, sir; but it was not about this case.

Q. What was it about? About the finances in New York?

A. It was his and my business.

Q. It was about yours and his Wall street brokerage in New York?

A. No, sir; I have not been to New York.

Q. Do you swear to this jury that he never said anything to you about this case?

A. Yes, sir.

(Witness excused.)

208 BENN VANN, recalled by the Government in rebuttal, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Do you know George Merril?

Answer. Yes, sir.

Q. Did you have a conversation with him on the afternoon or evening of the Schufeldt robbery and killing of Melton?

A. Yes, sir.

Q. What did he say to you as to who it was that did the killing?

A. He was talking to me and to my father and Bob Gaskins, and some more ladies that were there at the store, and he said that largest fellow was Cherokee Bill, *m* and that other one he thought was Jim French. He wasn't positive about that, but he knew that the other one was Cherokee Bill, is what he said.

Cross-examination by Mr. J. WARREN REED:

Q. This is twice you have been a witness in this case?

A. I suppose it is.

Q. Where were you talking to George?

A. At Lenapah, standing outdoors in the street.

Q. Who was around there?

A. Bob Gaskins, Dunk Vann, and some more women.

Q. Where is Dunk Vann?

A. At Claremore, I guess.

Q. Dunk Vann is charged with murder, is he not?

A. Yes, sir.

Q. What are you charged with?

A. Nothing.

209 Q. Who did you first tell this valuable information to; did you tell Mr. Schufeldt?

A. Yes, sir.

Q. Run right to Schufeldt with it?

A. No, sir.

Q. Do you work for Schufeldt?

A. No, sir.

Q. Do you trade in his store?

A. Yes, sir.

Q. How long?

A. About three years, I guess, off and on.

Q. Since you have been down here Mr. Schufeldt has talked to you quite frequently, has he not?

A. No, sir; not very much.

Q. Has he never mentioned the subject of the case to you?

A. No, sir.

Q. Never mentioned it?

A. Yes, I have heard him say a few words about it.

Q. Hasn't he talked to you half a dozen times about it?

A. No, sir.

Q. When this question came up about George Merrill going on the stand, didn't he go and ask you about it?

A. He never asked me but once.

Q. When was that; in the hall?

A. No, sir; I don't believe it was.

Q. Hasn't he been talking to you in the hall about it?

A. No, sir.

(Witness excused.)

210 ARTHUR DODGE, having been duly sworn upon behalf of the Government, was examined in chief in rebuttal by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. I live up in the Coo-wee-scoo-wee district, Cherokee Nation.

Q. How far from Nowata?

A. About 8 miles.

Q. How far from Lenapah?

A. About 12 miles.

Q. What direction?

A. Sort of southwest course.

Q. What direction from Nowata?

A. Northwest.

Q. Do you remember of hearing of the Lenapah robbery at the time Melton was killed there?

A. Yes, sir; I heard of it the afternoon it was done.

Q. Did you see two men go by your place on that afternoon?

A. Yes, sir; I seen two men go by before I heard of the robbery.

Q. What kind of men were they?

A. One was a good, big chunky man, and was a heavy set, dark-complexioned man, and the other was a small, light-looking fellow—looked like a white man.

Q. Did you know who they were?

A. No, sir.

Q. Have you seen the defendant here?

A. Yes; since he has been here in the court room.

Q. State whether or not he resembles one of them.

A. He resembles the large one very much.

Q. How close were you to them?

A. I presume about 40 yards.

Q. Which way were they going?

A. South and east.

211 Q. Did they get anything from your place?

A. Yes, sir; they got a horse.

Q. Were they horseback when you first saw them?

A. One was on his horse and the other was just in the act of mounting when I first saw them.

Q. Mounting a horse they had caught?

A. Yes, sir.

Q. Was that your horse?

A. It was my brother's horse, but it was in my care.

Q. Did they ask your permission to take that horse?

A. No, sir.

Q. What kind of a horse did they leave?

A. They left an old bay, bald face, stocking-legged horse.

Q. Do you remember what day of the week that was?

A. Yes, sir; it was on Friday.

Q. About what time in the day?

A. I think it must have been somewheres between on' and 2 o'clock in the afternoon.

Q. Did you talk with them any?
A. No, sir.
Q. Did they say anything to you at all?
A. No, sir.
Q. Did you ever get your horse back?
A. No, sir.
Q. Were they armed?
A. Yes, sir; had Winchesters.
(Witness excused.)

212 HENRY BASCOMB, having been duly sworn upon behalf of the Government, was called in rebuttal, and being examined in chief by J. B. McDonough, esq., the assistant district attorney, testified as follows, to wit:

Question. Where do you live?
Answer. Five miles northwest of Nowata.
Q. Do you know Mr. Arthur Dodge?
A. Yes, sir.
Q. How far do you live from his place?
A. About a couple of miles, I guess.
Q. Do you know Mormon Evarts?
A. Yes, sir.
Q. Is any akin to you?
A. Uncle.
Q. Did you hear of the Lenapah robbery after it occurred?
A. Yes, sir.
Q. Were you with your uncle on that evening?
A. Yes, sir.
Q. Where was he?
A. He camped on Mormon Creek.
Q. What time did you get to his camp?
A. Between 5 and 6 o'clock in the evening; somewheres along there.
Q. How long did you stay there?
A. Couple of hours.
Q. Did there anybody come there, or was there anybody there besides your uncle when you got there?
A. Yes, sir; there was a couple of men there.
Q. Who were they?
A. I think one of them was Cherokee Bill.
Q. Was is this man [referring to the defendant]?
A. Yes, sir; that is the man over there.

Mr. THOMAS H. BARNES (of counsel for defendant). I did not object awhile ago when Arthur Dodge was introduced as a witness, but of
213 course, the Government first makes its main case, and in making that it produces various witnesses claiming to identify the defendant. Now, then, when we have brought here testimony in the same direction, it seems to me it is not competent for the Government to start back over the case in rebuttal in that way.

The COURT. I think it is entirely rebuttal to your alibi testimony; entirely so.

Mr. THOMAS H. BARNES (of counsel for defendant). We don't think it is. We think it is the duty of the district attorney to make his main case upon that as everything else.

The COURT. They make a prima facia case of identification by eyewitnesses at the time of the killing, and they have the right, if you offer evidence tending to prove an alibi to rebut that alibi. This is clearly in rebuttal of the alibi.

Mr. THOMAS H. BARNES (of counsel for defendant). That may be right, but we will save an exception.

The ASSISTANT DISTRICT ATTORNEY. Is this one of the men that was there?

A. Yes, sir.

Q. Was there anybody else with him?

A. There was another man with him.

Q. Were they armed?

A. Yes, sir; they were both well armed.

Q. Were they riding, or were they on foot?

A. They were riding horses.

Q. Did you know one of the horses?

A. Yes, sir.

Q. Whose horse was it?

A. Rube Dodge's.

Q. Is that a brother of Arthur Dodge?

A. Yes, sir.

Q. How long did they stay there?

A. They staid long enough to eat their supper and feed their horses.

Q. They staid how long?

A. About an hour, I guess.

214 Q. Fed their horses?

A. Yes, sir.

Q. And took their supper?

A. Yes, sir.

Q. Then which way did they go?

A. They went south.

Q. You were not there when they came up?

A. No, sir.

The COURT. Did you know the other man?

A. No, sir; that was the first time I ever saw the other man. I saw Bill once before.

Q. Which one was riding the horse of Dodge's?

A. The other man.

(Witness excused.)

215 MORMON EVARTS, having been duly sworn upon behalf of the Government in rebuttal, was examined in chief by Mr. J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Q. Where do you live?

A. I live on Chelsa and Olawa; between there, about 12 miles from Chelsa—no, five miles.

Q. Where were you on the day of the Lenapah robbery and killing is said to have occurred?

A. I had gone out to Nowata, and I had stopped to stay all night at the camp there, and I never was near——

Q. Where did you camp there?

A. I camped there at that place, and I was fixing my tent, and it was raining; camped on that little creek called California Creek, which goes off south.

Mr. THOMAS H. BARNES (of counsel for defendant). We want to save an exception to this testimony also.

The COURT. He is an uncle of Bascomb?

The ASSISTANT DISTRICT ATTORNEY. Yes, sir.

The WITNESS. As soon as I got there where I can get wood, I stopped to make a fire right away before I took the harness off my mules, and my wife commenced to make dinner; pretty late dinner, though, and another old lady with me, Widow Harrison, and I just commenced fixing my tent right away. And I saw two young men coming, one fellow about ten feet behind the other, and I just looked at them. I thought it was some boys coming and I just kept on fixing my tent. Finally they got pretty close and I looked at them again. Both of them had guns in their scab-
216 bards—Winchesters. They said, "How do you do?" I said, "How do you do?" "Which way are you going?" "Oh, down here," and they asked me right away, "Do you know where I can get dinner around here," and I told him no, I am not much acquainted around here. I live close to Chelsa. Pretty soon I told them you might get dinner here pretty soon, and I guess the women folks will fix the dinner; get off and take a rest. They got off, and he took his gun right here, and I just kept on working with my pin. One of them was standing behind me, and the other one was off that side. Pretty soon the women folks said dinner was ready. All of us went there and eat our dinner, and the white boy, he sat down right close by me—looked like a white boy, and the other one looked like colored blood in it. That colored fellow got Winchester in his lap when he was eating, but that white boy he looks like he can't hardly fix some way, and then he laid his gun away off this way, and commenced eating. I just talked with them, and they treated me pretty good, too. When they got done eating they tried to pay my wife. My wife told them no, "I am not charging anything. I have not got anything much to eat." And as soon as I got done eating I just commenced fixing a few pins, and I saw the boys smoking cigarettes, and I went there and I told them, "Have you got some more cigarettes paper," and they says, "Yes," and he handed me a pretty near handfull, and I took one and gave them back, and he said, "No, you keep that; I have got some more," and he give me pretty near one package of tobacco, and I started to hand it back, and they said, "No, you can keep that; I have got some more." I says, "Thank you."

Q. Was Henry Baxcomb there?

217 A. Yes, sir. As soon as they got done eating I saw him coming, too, and I told them to come on and eat their dinner. He come there.

Q. Did Henry eat dinner?

A. Yes, sir; but them boys was setting by the fire, a little piece there, and I was there a little piece fixing my tent, but he saw them anyhow, and I guess he never spoke to them.

Q. What day of the week was that?

A. I can't tell about that, but I know it was on Friday. I don't know what day of the month it was.

Q. Did you see the Winchesters that they had?

A. Yes, sir.

Q. What kind of looking Winchesters were they?

A. Kind of old looking; not brand new gun'. Just been used about two years or something longer than that.

Q. Do you know the size of the Winchesters?

A. No, sir.

Q. How long did they stay with you?

A. I think about an hour.

Q. Have you seen the defendant here?

A. Yes, sir. [Witness looks over court room.] Yes; that is that boy, that *ome* there [pointing to the defendant].

The COURT. That is the one you thought that had colored blood in it?

A. Yes, sir.

Q. Do you know the other one?

A. No, sir.

Cross-examination by Mr. J. WARREN REED:

Q. You don't know what month that was in, do you?

A. No, sir.

Q. You don't know what year it was in, do you? How old are you?

A. I don't know. I am pretty old; over 40.

218 Q. What year were you born in?

A. I don't know about that. I am pretty near a full blood.

The ASSISTANT DISTRICT ATTORNEY. Did you see the horses they were riding?

A. Yes, sir.

Q. What kind of horses?

A. Bay horses.

Q. Did you know Arthur Dodge's horse?

A. No, sir.

Q. Were they both riding a bay horse?

A. Yes, sir.

Q. Any white about either horse?

A. I don't know anything about that.

By Mr. J. WARREN REED:

Q. You Indian fellows call a bay horse a red horse, don't you? Did you ever see a red horse?

A. I don't know about that.

Q. Don't you call them red?

A. I don't know anything about that.

Q. Don't you call a sorrel horse a red horse, and a bay horse a red horse?

A. I don't know anything about that.

Q. Ain't a red horse a bay horse, and a bay horse a red horse?

A. I don't know anything about that.

(Witness excused.)

219 HECK THOMAS, being called upon behalf of the Government, was examined in chief by Mr. J. B. McDonough, the assistant district attorney, and testified as follows, to wit:

(The witness was here sworn.)

Mr. THOMAS H. BARNES (of counsel for defendant). We were going to object to Mr. Thomas being sworn. We now object to his being examined as a witness on the ground that under the sta'ute the defendant is required to have 48 hours' notice of witnesses to be used by the Government, and we have had no notice of an intention to use Mr. Thomas as a witness.

The COURT. The court has always held if it is in rebuttal it is absolutely impossible to give the defendant notice of the witness. If that is the rule, that you have to give 48 hours' notice to the defendant of witnesses to be used in rebuttal, it would simply amount to a defeat of justice, and defeat of a trial altogether. The reason of the rule is very manifest, but when it comes to facts that are purely in rebuttal no notice can be given, because it is impossible.

Mr. THOMAS H. BARNES (of counsel for defendant). Of course, I understand the position of the court, but we simply want to discharge what we thought our duty in this matter, and we except to any statement of what the witness will prove, and we except to the use of the witness. We do not think it is competent, either in chief or in rebuttal, and therefore we save an exception to the whole proceeding.

220 The ASSISTANT DISTRICT ATTORNEY. The facts I want to establish by Mr. Thomas are about these: That he, in an attempt to capture the defendant, had a fight with him on the 16th of November. A witness for the defendant was on the stand, and the court remembers what he said about the time he saw the defendant, a week after the Frank Daniels fight. We propose to show the date of that fight, which will be the 16th of November, and also as to the kind of hat the defendant was wearing, and that he had at that time a wire cutter in his possession.

Mr. THOMAS H. BARNES (of counsel for defendant). The wire cutter part certainly would not be rebuttal.

The ASSISTANT DISTRICT ATTORNEY. Yes, it is; because they have introduced evidence to show that this country was covered with wire fences.

The COURT. Yes; these facts are all entirely competent, in the judgment of the court.

Mr. THOMAS H. BARNES (of counsel for defendant). We except to the witness being examined.

The ASSISTANT DISTRICT ATTORNEY. You know the defendant, do you, when you see him, Cherokee Bill?

A. I do now.

Q. You are an United States officer?

A. Yes, sir.

Q. State if you saw him, or tried to capture him, some time in November.

A. Yes, sir.

Q. Where?

A. At Frank Daniels', near Sequoyah.

Q. What was the date of that?

A. It was the night of the 16th of November last.
Q. Did you get the defendant's horse?
A. We got his horse the next morjing.
Q. Did you get his hat?
A. Yes, sir; got the hat that night.
221 Q. What kind of a hat was it?
A. It was a large black hat, with a little white plume in it.
Q. State whether there was attached to his horse any wire cutter.
A. On the saddle there was a little outside pocket with a wire cutter fit down in it. I got a pair of wire cutters out of it.
Q. Have you got it now?
A. No, sir.

Cross-examination by Mr. J. WARREN REED:

Q. What was McIntosh's horse, wasn't it?
A. I turned the horse over to a man named McIntosh; it had been stolen from him a few nights before.
Q. It was a brown horse you turned over to the man who claimed it?
A. Yes, sir.
Q. That fight was in the night, wasn't it?
A. It was just getting dark. It wasn't quite night.
Q. How many men were in the fight?
A. There was four men with me.
Q. How many with the other man?
A. Three.
Q. Were you fighting at long range?
A. Yes, sir; it was most too far.
Q. How far were you apart; half a mile?
A. They were about 100 yards when the first shot was fired.
Q. Were they in the woods or timber?
A. No, sir; in a prairie glade.
222 Q. You didn't distinguish any man's features that was in the band that distance?
A. No, sir.
Q. All you know is you found a hat some place around there?
A. We found a hat where the parties were when the first shot was fired.
(Witness excused.)
Testimony closed.

223 Whereupon, after argument of counsel, the court charged the jury as follows:

224 In the circuit court of the United States within and for the western district of Arkansas, February term, A. D. 1895.

THE UNITED STATES
vs.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL. } Murder.

Charge of the court.

Delivered Feb. 27th, A. D. 1895—8.45 a. m.

PARKER, J.:

Gentlemen, the defendant in this indictment is charged with the crime of murder for having with a gun willfully, and with malice aforethought,

taken the life of Earnest Melton, who is alleged in the indictment to have been a white man. That is the first proposition to be found by you. It is a jurisdictional proposition, and necessary to be established by the testimony that Earnest Melton was a white man.

In a charge like this there are two general propositions. The first one is the fact that a crime exists, that the crime of murder was committed. The second one is that the defendant is the party who committed that crime. These are the two general propositions that you are called upon to solve here. You are to solve them by the light of this testimony, and by the law that is given you, defining the crime. To ascertain if a crime has been committed, you are required to find certain things, and you understand, of course, that all of these propositions are to be found
225 to that degree of certainty prescribed by the law; that is, beyond a reasonable doubt. The first one to be found is that Earnest Melton is dead; and the second one is that he died by violence. I pass these over hastily because they are propositions about which there is no controversy in this case; the third proposition is that this violence was inflicted with a gun; that is, that Earnest Melton was shot and received a wound which caused his death. The fourth proposition is that this violence which produced his death was the act of the defendant. Over that there is controversy. The fifth proposition is that the act which produced the death of Earnest Melton was done willfully, and done with malice aforethought. These are the two things, which, coupled with the act of physical violence that produced the deadly result, that are necessary to make the crime of murder. If they do not exist, there is no murder in it. If the fact exists that a man's life has been destroyed in the manner and by the means named in the indictment, and that act of destruction was a willful act, and being willful was done without just cause or excuse, or in the absence of legal provocation, the killing has these characterising traits which go to make the crime of murder; that is, it was done willfully, and done with malice aforethought. Now, these expressions in the law have a legal meaning. It is therefore necessary that the court should briefly define them to you, and tell how you may find them. The word "willful," as used in this connection, means intentional and not accidental. It means, in other words, that the act which produced the death was intentionally done, and that it wasn't what in the law is recognized as an accident. If that act was intentionally done, the law recognizes the fact that it was willfully done, and if the act
226 even which produced death was willfully done, in the law the result is regarded as a willful result. Especially is that true when the act which produces the death is an act executed by means of a gun or pistol, weapons made for the purpose of destroying animal life, constructed with that purpose in view, constructed so as to be adapted to the purpose, constructed so that when used in a certain way, as a rule, generally, reasonably, or probably, such act will produce death. Therefore, when you find that the act was willful, you necessarily are authorized to find that the result was willful. Now, this matter of intent, as to whether a man intends a result or not, is a matter of inference. It is a matter that you can find only by inference. You can only find it by circumstances. As I tell juries so often, there are two propositions that enter into every murder case that must be found alone by circumstantial testimony. They

can not be found in any other way, and they are propositions growing out of mental condition, because you can not prove mental condition by positive evidence. You can only take the acts done by the party, and from these acts reason back to the power which dictates the act—the mind of the party. For example, it is a matter of common conclusion if you see a man draw a gun within shooting distance of another, and present it at him, and fire it, and the man falls dead, you naturally conclude that he intended to kill him, that he willfully killed him, and that the act of killing was a willful act. Now, how do you find that? You do not lay down your premises formally, according to the rules of logic, but the mind unconsciously rushes to the conclusion from what you saw him do that he intended that result. You are conscious of the fact that
227 he knows the nature of the weapon, and knows when used in a way which will produce that result, and when you see him use it in that way you naturally infer that he intends the result, and so the law says he intends it. And it becomes an easy matter to find whether a deadly act is intentionally done when it is executed with a gun or pistol. When it is executed in such a way as to indicate from the manner of the execution that the man wills to shoot, and consequently wills to kill, you can come to the conclusion without much effort, and without much trouble, that the act is willful upon his part. That is exactly how you may find it. You take his action, his conduct, take the very result produced by him, and it does not make any difference that he might not have had a specific design to kill at the time. The law says that if he willfully does an act which naturally, reasonably, or probably may kill, that he does intend to kill. I shoot into this crowd of people; I shoot upon the street; I shoot anywhere willfully and intentionally, so as to jeopardise or destroy human life; the law says that act is a willful act upon my part.

Now, a word or two as to what the law says especially as to the method of finding that the act was willfully done.

"The law can not look into a man's mind to find out his intent. It is forced to judge of his intention from his act. Acting on this principle, the presumption of the law is that a man is held to have intended the natural and ordinary consequences of his acts."

Reading from the case of the Commonwealth v. York, where the law was declared by Chief Justice Shaw:

"A sane man, a voluntary agent, acting upon motive, must be
228 presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life."

Then, in passing upon the question as to whether the killing was willful, you take the nature of the act done, find out how it was executed, what it was executed with, how the weapon was held, whether it was held in such a position as to jeopardise the life of the party, and whether it was willfully so held. Of course, you can only find it was willfully held by the acts attending the shooting, the very holding the gun in the position it was held, bearing in mind that a gun is a mere automaton. A man's hand will do nothing, unless the mind commands the act first to be done. That is the fact about it. The mind is the governing power of every member

of the human body, and whenever a man takes a gun in his hands, presents it at another, pulls the trigger, and fires it upon another, that is an act of the mind; the mind commands that all to be done before it is done, and we take the very thing that is commanded to be done, and that is done, and we reason back and find the condition of the mind.

I say to you, if you find from the evidence in this case that a gun was presented at Earnest Melton, and fired upon him, held in that position and fired in that way, you have before you that which you can take into consideration to enable you to find that the act which resulted in his death was a willful act, and consequently the killing was willful. That
229 is the first proposition involved in the definition of the crime of murder.

The second proposition is, that it was done with malice aforethought. As I have told you, if you find a mechanical act which resulted in death, if you find it is characterised by these two traits, these characteristics of the crime of murder, murder is established. It exists. Now, what is meant by this trait called malice aforethought? What is the legal meaning of it? If you have a case where the killing is done willfully, done intentionally, and there is no justification offered, there is nothing to mitigate that crime; the fact that it was done willfully shows that it was done with malice aforethought. Why? Because malice aforethought means, in a case like this, the doing of a wrongful act which results in death, without just cause, or in the absence of legal provocation, or mitigating circumstances. In other words, the very proof that would establish the fact that it was done willfully would show in such a case as that I have named, in the absence of these things that justify or mitigate, that it was done with malice aforethought—the doing of a wrongful act which results in death, without just cause or excuse, or in the absence of mitigating facts. That is one of the definitions of malice aforethought, and perhaps as good a one as can be given. There is another definition, which says, that if the act of killing is done so wantonly, so wickedly, and so recklessly as to show that he who does it has a heart void of social duty, and a mind fatally bent upon mischief, that is then the characteristic of malice aforethought. Now, what is meant by that? What does it really mean? If we bear in mind our relative duties to each other as members of society, it is easily understood. The primary and greatest duty that
230 devolves upon all of us is not to destroy human life, not to destroy innocent human life, but to protect it. If we so far forget that duty as to recklessly and wantonally and wickedly take human life when there is no just cause for it, when there are no mitigating facts which can be asserted in our favor surrounding the act done by us, we show that we have a heart void of this social duty which commands us to protect innocent human life rather than to destroy it. And the very fact we execute an act in that way shows we have a mind fatally bent upon mischief.

A word or two further as to this characteristic from decided cases, that we may understand what it means.

"Malice means the intention to do bodily harm; a formed design to do mischief."

Of course, in a case where a killing is involved, and the question is raised as to whether it is a crime, it means intention to do such harm as that death resulted from it.

"It has also been defined as a deeliberate intent to kill."

That is why I told you a while ago that if you found a killing was wilfully done, and you necessarily found it was intentional, and wherever there was an intentional killing, a formed design to do that which may result probably, naturally, or reasonably in the destruction of human life, there was nothing that could be asserted in the law, or that was pertinent to be asserted in the case, that would justify or mitigate it, and the fact that it was done intentionally, and that the evidence showed a deliberate intent to kill under such circumstances, would show that it was done wantonally and recklessly and wickedly, and that it was a willful act done without just cause or excuse, or in the absence of mitigating facts,
231 or such things as could be asserted to place the crime under another classification than that of murder.

"It does not necessarily import any especial malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and deliberately bent on mischief. It imports premeditation. Therefore, there must logically be a period of prior consideration, but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed, The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief as thus formed is a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

We know that. That is a matter of common knowledge, especially in this day when with the greatest ease, and the greatest despatch, human life can be taken by these wonderful instruments of death; when a man can form a purpose instantaneously with its execution, in the twinkling of an eye. If that is the state of case, if that weapon is used, from the manner of its use you are able to see that it was deliberately used, that it was willfully used, you have a state of premeditation, because the very willful use of the weapon points to premeditation, shows thought of beforehand, shows that the party conceived the design of doing an act which was a deadly act.

232 "Malice is an intent of the mind and heart."

We are now to learn how we may find malice, just as we learned awhile ago how we may find that the act was done willfully.

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs. And we are entitled to infer what his intent was, what were the processes of his mind, and the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has put it, there

is no case of malicious homicide in which malice is not inferred from attendant circumstances. No case in which it is demonstrated as express. We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result, is from our common experience presumed to have anticipated the result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed for any definite period before the fatal blow. From the very fact of a blow being struck, we
233 have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant."

We are told here that we are to find this characteristic of the crime of murder by looking at the circumstances of the killing, by taking into consideration these circumstances, to see whether there was anything that mitigated the crime in our judgment, or that gave the party a right to do it. Now, it becomes still easier to find this characteristic of the crime of murder if the proof shows that the murder was committed while in the execution of another crime known as robbery. A man takes a human life in an attempt to rob, or while his confederate is actually engaged in doing the robbing, or as a part of that robbery; we have that which shows a mind fatally bent upon mischief. We find a man, or a number of men who may be engaged in an enterprise of that kind possess hearts void of all social duty. We find the execution of an act which is unwarranted by the law in the shape of a robbery, the taking of property of another from his person or his presence by violence, or putting him in fear, against his will, taking it against his will, in the execution of the crime of robbery. I say, when you have that as attending or connected with the act of killing, it becomes easier to find the existence of this characteristic known as malice aforethought; and that the act was done willfully. And it does not matter as far as the existence of this characteristic of the crime of murder is concerned whether the party had the primary purpose simply to shoot and frighten, or whether it was a specific and well-formed design to kill. The test is, if the party had the purpose to do the
234 act willfully, which might probably, naturally, or reasonably result in death under such circumstances, as a part of the crime of robbery, or is connected with the crime of robbery, then you have that which would go to show the existence of malice aforethought.

Now, using the language of an eminent jurist who charged the jury in the Giteau case, wherein he said:

"Malice aforethought does not mean that it can be proven upon the part of the accused that there was no special ill will or hatred or grudge," in this case, of course, upon the part of the defendant towards Earnest Melton. It matters not that he may never have seen Earnest Melton. A man may kill an entire stranger, and if the facts show that he killed him willfully, without just cause, and in the absence of mitigating facts and circumstances, it is as much murder as though he had killed his bosom companion, a man he had known all his life. The life of every man in this country, no matter whether he is the stranger within our gates or our friend

and acquaintance, is under the solemn and august protection of this mighty power called the law of the land. Everywhere the law is around him, and he is entitled to its protection, and if he is wantonally, wickedly and recklessly, and willfully killed, his killing under such circumstances is murder, because it is done with malice aforethought. "When a homicide is shown to have been committed without lawful authority, and with deliberate intent, it is sufficient to show it to have been done with malice aforethought." I might have simply stated to you that proposition, and there left the definition of malice aforethought. It is clear and concise, and at the same time a full explanation of this distinguishing
235 characteristic of the crime of murder known as malice aforethought.

It is not claimed by the counsel for defendant in this case that as far as the killing of Earnest Melton is concerned that there was any self-defense in it, or that there were any facts connected with that killing growing out of the conduct of Earnest Melton at the time of the killing that under the law they could be asserted as mitigating facts to reduce the grade of the crime. Therefore, if the facts show that it was done without lawful authority, and done with a deliberate intent to do the act which killed, which produced death, you may take it as sufficient proof to have been done with malice aforethought.

The propositions in this case are few and simple. They are easily understood. The question, and the great question, in the case is whether or not, first, the crime of murder exists according to the definition of that crime as I have given it to you, and, secondly, whether or not this defendant is the party who committed that crime. You are to know these truths by the light of the evidence which has been offered before you, by evidence whether of a positive character, or whether it is circumstantial in its nature. You have a right, first, to take into consideration, in passing upon this proposition, the opportunity the witnesses had for identification, the application of that opportunity, whether they told you that they identified the defendant as one of the participants in that crime, and as the man who fired the shot which took the life of Melton. That is a positive fact. That is evidence given by ocular proof, by the fact that the circumstances sought to be proven was observed by the application of one of the five senses by the witness or witnesses. Then you are to
236 take into consideration what circumstances corroborate these positive statements. The first duty in passing upon the evidence is to find out what is the truth and what is false in the case, and then to see what that testimony which you find to be true establishes, what it proves. If all of it together, these positive identifying statements of the witnesses who came before you as positive witnesses, together with the circumstances in the case, satisfy your minds beyond a reasonable doubt of the guilt of the defendant as charged, your duty is to convict him of this crime.

It is necessary for me to define to you, in this connection, what is meant by this thing of the law requiring a proposition to be established beyond a reasonable doubt. I can better define that by giving you the declaration of the law as laid down by the Supreme Court of the United States in adjudicated cases. I say to you that it means this: That the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in

that case find him not guilty. You are further instructed that you can not find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt. Again, as to the definition of this phrase "beyond a reasonable doubt." A reasonable doubt is a doubt based on reason, and it is reasonable in view of all the evidence, and if after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say you have
237 an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to the affairs of other men that might come before you, you then have no reasonable doubt, and the proposition under such circumstances would be so established as that you would be bound to receive it as proven. Again, quoting from the language used in the case of The Commonwealth v. Webster, a celebrated murder trial in Massachussetts:

"The evidence must establish the defendant's guilt to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

Again, in the case of The Commonwealth v. Costley, it was declared:

"An instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt had even been held sufficient without further explanation."

It is sufficient for me to tell you if you find this defendant guilty by these facts proven to beyond a reasonable doubt, it would be your duty to find him guilty; and I might stop there, but there might be some misunderstanding; you might misconceive what is meant by this expression of proving a case beyond a reasonable doubt. Some gentleman might come to the conclusion that it was necessary to be demonstrated absolutely, beyon l peradventure, or any doubt, or so that all doubts were driven out of the case. That is not the law. It means, before you can find the defendant guilty all doubts for which good reasons can be given shall be driven out of the case by proof, and although the proposition
238 may be confronted by some doubt, as all propositions in life are, because no proposition can ever be asserted without being confronted by some d*ou*'ts, but they are skeptical doubts often; they are unreasonable doubts. If they are doubts of a skeptic, if they are unreasonable doubts, if they are irrational doubts, if they are not supported by facts and circumstances so that a reasonable man would consider them as reasonable doubts, they are to be disregarded in a case. It is only reasonable doubts that are to prevail in deliberating upon these matters of magnitude and importance.

Quoting from the case of Rex v. Muller, an English case, upon this subject of reasonable doubt, the court said, speaking of Chief Baron Pollock's statements on the subject:

"I have often heard," said the chief baron, addressing the jury, "the late Lord Tenterden lay down a rule which I will pronounce in his own language: 'It is not necessary that you shall have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you would transact your own most important concerns in life.'"

I would not put it that way, because we are all of us interested in our own concerns, and we might not be competent to pass upon the question as to whether the doubt was a reasonable one or not, but the better rule is that we should have that certainty upon which we should transact the important concerns of other men brought before us, where our interests were not so great that we might be incompetent to pass upon the question as to whether a doubt was a reasonable one or not, passing upon
239 concerns where we are so impactial and so disinterested as to be entirely competent to judge whether the doubt is a reasonable one or not.

"No doubt the question before you to-day, involving as it does the life of the prisoner at the bar, must be admitted to be of the highest importance, but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life."

I modify that in the way I have given it to you, by saying to you the degree of certainty upon which you would act when transacting the important concerns of other men.

"To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect."

Now, gentlemen, that is the definition of this expression known as reasonable doubt—that is the finding of a proposition beyond a reasonable doubt. Now, the question is, first, whether Earnest Melton was murdered, according to the definition of the crime as I have given it to you; you are to be satisfied of that to the extent I have named to you when reading from these adjudicated cases; and, secondly, was that murder committed by the defendant. Are you satisfied of that beyond a reasonable doubt? If you are, take into consideration, as I have remarked to you, that it is your duty first to judge of the credibility of the evidence, to judge of the proving power of that evidence, and after you have so acted, to pass upon the question, after gathering al' the evidence up, to see whether or not that testimony, the testimony of identifying witnesses, the circumstances and facts putting the defendant in proximity, or so near the place of the crime as to make it possible for him to be there.
240 After you have gathered all these facts up, see whether, in your judgment, this testimony is equal in proving power to the testimony of one positive, credible, reliable witness. If so, you are authorized to act upon the testimony that is equal in proving power to the testimony of one such witness, because the law says out of the mouth of one credible, reliable, and uncontradicted witness may a man be condemned even of the highest crime. As a matter of fact, that is never done, because if the testimony of one such witness be true, there is a whole troop of other truths that come along and sustain his statements and corroborate what he says. Therefore, it is your duty to take the testimony of the witness, or witnesses, and look at its consistency in its own light, to see whether it is harmonious in its particulars, and then again whether it is in harmony with other truths in the case, because if it is, one truth strengthens another, one truth corroborates another, one truth supports another.

Then I say to you, in conclusion, take into consideration all these facts, all these circumstances, everything that has been offered before you, and find the truth of them. If you are satisfied in the way and to the extent

I have named to you as satisfaction beyond a reasonable doubt that the charge is established as proven, your duty is to find the defendant guilty of the crime of murder, because there is no other crime in *his* case. There is only one charge of which you can find the defendant guilty, and that is of the crime of murder. If you find him guilty of that crime, you will say, "We, the jury, find the defendant, Crawford Goldsby, alias Cherokee Bill, guilty of murder as charged in the within indictment, and sign it
241 by one of your number as foreman." If you find him not guilty as charged, you will put the word "not" before the word "guilty" in the blank form on the back of the indictment.

Gentlemen, the case is submitted to you.

Mr. BARNES (of counsel for defendant). Mr. Read has two or three exceptions.

The COURT. I would like to have him read them out right here in the presence of the jury. (After a pause.). You can consider them filed in the presence of the jury. You can just file them.

9:30 a. m.

242 To which charge of the court the defendant at the time and in the presence of the jury filed the following exceptions:

243 UNITED STATES COURT,
Western District of Arkansas:

UNITED STATES
vs. } No. 106. Murder.
CRAWFORD GOLDSBY.

Defendant excepts to the charge of the court herein for the following reasons:

That the court erred in saying the intent to kill can be formed in an instant, and if the killing follows from only one instant's deliberation it would be murder.

2nd. The court erred in saying that if a person kills another while a confederate was engaged in robbery would show that his mind was fatally bent on mischief, and make the killing murder, without qualifyin' the statement by adding in the same connection that Melton, deceased, must be shown to be without fault, and doing nothing to provoke the killing.

3rd. That the court erred in saying that notwithstanding there may be some doubt of defendant's guilt, yet the jury may convict him.

4th. In saying to the jury that if the testimony at place of killing shows the case to bee proven by one witness without saying that they must consider the alibi testimony offered by the defense with that offered by the Government at the place of killing.

5th. That the court erred in not giving the law governing alibi testimony of the defendant, and what proving power should attach to the same.

244 Whereupon the jury retired to consider of their verdict and afterwards returned into court the following verdict:

"We, the jury, find the defendant, Crawford Goldsby, alias Cherokee Bill, guilty of murder as charged in the within indictment.

"(Signed) MARTIN EAST, *Foreman.*"

And be it further remembered that afterwards, on the 13th day of April, 1895, the defendant being brought to the bar of the court, the court pronounced the sentence of death upon him, to which judgment and sentence the defendant at the time excepted and was given until the 29 day of April, 1895, to prepare and file a bill of exceptions, which the defendant now tenders and prays that the same may be signed and made a part of the record in this cause, which is accordingly done. April 29, 1895.

I. C. PARKER,
U. S. Dist. Judge Presiding in the Circuit Court.

(Endorsed on back:) Filed April 29, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

245 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas, February term, 1895.

UNITED STATES, PLAINTIFF,
vs.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL, DEFENDANT. } Murder.

The defendant in the above-entitled cause, Crawford Goldsby, files this assignment of errors committed on the trial of said cause, to wit:

First. The court erred, on Feb. 12, 1895, in overruling defendant's motion for a continuance as embodied in his first application for witnesses on the 12th day of Feb., 1895 (for the reason that having been first committed to jail on the 31st day of January, 1895, and having had no preliminary or commissioner's examination of his case and in the sense and meaning and spirit of the Constitution of the United States he had not been "informed of the nature and cause of the accusation" against him—in other words the facts and circumstances of the charge had not been made known to him by witnesses before the United States commissioner that he might be fully informed of the charge and prepare to meet it).

Second. The court erred on Feb. 12, 1895, in overruling defendant's first application for Ellen McGee, Manda Foster, man who is unknown, Mary Hendricks, wife of Tom Lowe, wife of Joe Roach, wife of Tuck Roach, wife of John Foreman, wife of William Vann, and the wife of Robt. Turner, as witnesses, applied for in the first application, for the reason that the facts that defendant could prove by said witness, as
246 shown by said application were, in the light of the issue presented, competent and material to his defense.

Third. The court erred on Feb. 19, 1895, in overruling defendant, third application for Tom Harris and Minerva Harris, for the reason that the facts that could have been proven by them as shown by said application were competent and very important for the defense.

And while said witnesses were given in the list of Government witnesses, and yet not put upon the stand by the Government, but one of whom, Tom Harris, was put on the stand by the defense, whose testimony was important for defendant, as will be seen by reference to his testimony, page , record of evidence. Yet defendant was entitled to have had

the other one, Minerva Harris, whose testimony would have been equally strong for defendant on the question of identity, and shown that defendant was not one of the men who did the alleged killing.

Fourth. The court erred on the 23rd of Feb., 1895, by overruling defendant's motion for a continuance, which also embodied a fourth application for eight additional newly discovered witnesses, for the reason that the court had previously, on the 12th day of Feb., 1895, and on the 16th day of Feb., 1895, allowed defendant Alex. Cochran, George Marcum, and William Smith, and one Butcher Ross, and subpœna for said witnesses was duly placed in the hands of the marshal, and defendant had no further control over the subpœna; and defendant had used all the diligence in his power to procure said witnesses, who were then not in attendance, and that the facts to which they would testify, as shown by the application (in the light of the issue presented), were competent and material. And for the further reason, as shown by said motion and fourth application, that defendant since filing his previous third application had learned of eight additional witnesses (see fourth application,
247 made part of motion to continue), and in the light of the issue presented, the facts that said defendant could have proven by said witnesses, as shown by said application, were competent and very material to his defense to show that defendant was not one of the two men who engaged in the robbery and alleged killing.

Fifth. The court erred in admitting the testimony of Charley Patton, page of record, in reference to receiving a watch charm introduced in evidence from Verdigris Kid in the presence of Crawford Goldsby without laying the proper foundation therefor and connecting defendant with said transaction in a way to make said evidence binding on defendant.

Sixth. The court erred in refusing to allow defendant to prove by one James Rose (page , record of evidence) that the same day of the alleged killing, Government witness John Shufelt and his father were together in said Shufelt's store at Lenepah and talking about and giving an account of the alleged killing of Melton, and describing the two men who robbed said Shufelt's store, and did said killing, and that in the conversation between said two Shufelts describing said robbers, the father of John Shufelt said, in the presence and hearing of witness and said John Shufelt, that the largest one of said robbers was a white man and rather red complected, and the smallest one of said robbers was an Indian most a full blood, who was a small man weighing about 140 pounds. This statement by John Shufelt's father was made in the presence and hearing of John Shufelt, who did not contradict it, and in the same conversation with said witness Rose, John Shufelt, and his father.

Seventh. The court erred in admitting the testimony of Henry Bascom (page of record) in rebuttal for the reason that the Government having offered evidence tending to show defendant at the place of the kill-
248 ing should have offered all their evidence upon that question in chief.

Eighth. The court erred in admitting the testimony of Heck Thomas, a Government witness, against defendant (page of record) for the reason that defendant had not been served with notice of said witness Thomas 48 hours before his trial, and the further reason that the testimony of said witness Thomas was not competent in rebuttal or otherwise.

Ninth. The court erred in its charge to the jury by disregarding defendant's alibi testimony, and nowhere in the charge putting it or leaving it a debatable or open question for the jury to find whether or not the defendant was one of the two men who committed the robbery and did the alleged killing, but treats all the testimony through the whole charge so the effect of it is to lead the jury to believe that the defendant was present and did said killing.

Tenth. The court erred in its charge to the jury on the question of the killing when it said (page of record), "I say to you, if you find from the evidence in this case that a gun was presented at Ernest Milton and fired upon him held in that position and fired in that way you have before you that which you can take into consideration to enable you to find that the act which resulted in his death was a wilful act, and consequently the killing was wilful, &c.," which was misleading, and had the effect of leading the jury to disregard the alibi testimony of the defendant without in the same connection instructing the jury that this does not apply to the defendant unless they believe from the evidence that the defendant fired the shot that killed deceased, Melton, or was one of the two men present and engaged in the robbery and aiding and abetting in said robbery and killing.

Eleventh. The court erred in its charge to the jury because it nowhere instructed them that before the law of a wilful killing or
249 intent to kill and malice aforethought (as was given to them by the court) could apply to defendant's case they must first believe from the evidence that defendant was present and did the alleged killing, or aided or assisted therein; and in passing upon defendant's guilt or innocence they must consider the alibi testimony offered by defendant to prove that he was elsewhere and not at the place of the killing, and so far away as not to be able to participate therein.

Thirteenth. The court erred in its charge to the jury (page of record) when it said, "It is not claimed by the counsel for the defendant in this case that as far as the killing of Ernest Melton is concerned that there was any self-defense in it, or that there were any facts connected with that killing growing out of the conduct of Ernest Melton at the time of the killing that under the law they could be asserted as mitigating facts to reduce the grade of the crime. Therefore, if the facts show that it was done without lawful authority and done with a deliberate intent to do the act which produced death, you may take it as sufficient proof to "have been done with malice aforethought," which was argumentative and misleading and had the effect of leading the jury to disregard the alibi testimony offered by defendant.

Fourteenth. The court erred in its charge to the jury by giving undue prominence to the identifying testimony of the Government witnesses at the place of the killing, tending to show it was defendant who committed the alleged crime by saying to the jury (page of charge) as follows: "The propositions in this case are few and simple. They are easily understood. The question, and the great question, in the case is whether or not, first, the crime of murder exists according to the definition of that crime as I have given it to you; and, secondly, whether or not this defendant is the party who committed that crime. You are to know these
250 truths by the evidence which has been offered before you, by evidence whether of a positive character or whether it is circumstan-

tial in its nature. You have a right, first, to take into consideration in passing upon this proposition the opportunity the witnesses had for identification, the application of that opportunity, whether they told you that they identified the defendant as one of the participants in that crime, and as the man who fired the shot which took the life of Melton. That is a positive fact. That is evidence given by occular proof, by the fact that the circumstances sought to be proven were observed by the application of one of the five senses by the witness or witnesses.

"Then you are to take into consideration what circumstances corroborate these positive statements. The first duty in passing upon the evidence is to find out what is the truth and what is false in the case, and then to see what that testimony which you find to be true establishes, what it proves. If all of it together, these positive identifying statements of the witnesses who come before you as positive witnesses, together with the circumstances in the case satisfy your minds beyond a reasonable doubt of the guilt of the defendant as charged, your duty is to convict him of this crime."

Whereupon the errors above stated being considered the said defendant prays that the said judgment and sentence against him be reversed and a new trial be granted.

CRAWFORD GOLDSBY, alias CHEROKEE BILL.
By J. WARREN REED and THOS. H. BARNES,
His Attorneys.

(Endorsed on back:) Filed May 4, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

251 *Petition for writ of error.*

In the United States circuit court for the western district of Arkansas.

UNITED STATES
vs. } Murder.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL.

To the Clerk of the Circuit Court of the United States for the Western District of Arkansas:

Your petitioner, Crawford Goldsby, alias Cherokee Bill, respectfully represents that at the February term, A. D. 1895, of this court he was convicted on the indictment No. 106, charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in said cause there is great manifest error to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing the said cause and the record therein to the said Supreme Court in order that the same may be there reexamined and if error be found that the said judgment and sentence against him therein may be reversed.

CRAWFORD GOLDSBY alias CHEROKEE BILL.
By J. WARREN REED and THOS. H. BARNES,
His Attorneys.

(Endorsed on back:) Filed May 4, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

252 *Poverty affidavit.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
CRAWFORD GOLDSBY, ALIAS CHEROKEE BILL. } Murder.

I do solemnly swear that I am the identical Crawford Goldsby, alias Cherokee Bill, convicted of murder at the February term, 1895, of the United States circuit court for the western district of Arkansas and now seeking a writ of error to the Supreme Court of the United States; that I am poor, without property of any kind, real or personal, and that I am utterly without means to pay the costs of prosecuting said writ of error.

CRAWFORD GOLDSBY.

Subscribed and sworn to before me by Crawford Goldsby, alias Cherokee Bill, this 4th day of May, 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed May 4, 1895. Stephen Wheeler, clerk.

253 UNITED STATES OF AMERICA, ss.

The President of the United States, to the honorable the judge of the circuit court for the western dist. of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States, plaintiff, and Crawford Goldsby, alias Cherokee Bill, deft., a manifest error hath happened, to the great damage of the said Crawford Goldsby, alias Cherokee Bill, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13 day of May, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western Dist. of Ark.
By I. M. DODGE, *D. C.*

Allowed by

Justice of the Supreme Court of the United States.

254 UNITED STATES OF AMERICA, ss.

To Jas. F. Read, esq., U. S. attorney for the western dist. of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Crawford Goldsby, alias Cherokee Bill, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
U. S. Dist. Judge for Western Dist. of Ark., holding Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I, Jas. F. Read, U. S. atty. for the western dist. of Arkansas, hereby accept service of the withi' citation and waive service by an officer.

JAS. F. READ, *U. S. Atty.*

255 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record proceedings in the case of U. S. vs. Crawford Goldsby, alias Cherokee Bill, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 14 day of May, A. D. 1895.

[SEAL.]

S. WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

256 CRAWFORD GOLDSBY, ALIAS Cherokee Bill, *vs.* THE UNITED STATES. } In the Supreme Court of the United States on appeal.

We hereby waive notice on the application to advance the above entitled cause on the docket of the Supreme Court, and agree that said case shall be set for hearing on the 3rd Monday of October, A. D. 1895.

J. WARREN REED and THOS. H. BARNES,
Attys. for Plft. in Error.

(Indorsement on cover:) Case No. 15908. Term No., 1024. Crawford Goldsby, alias Cherokee Bill, plaintiff in error, vs. The United States. W. Arkansas. C. C. U. S. Filed May 20, 1895.

FILED.
MAY 24 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CRAWFORD GOLDSBY, ALIAS CHEROKEE
Bill, plaintiff in error,
v.
THE UNITED STATES.

No. ~~1024~~ 620

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CRAWFORD GOLDSBY, ALIAS CHEROKEE
Bill, plaintiff in error,
v.
THE UNITED STATES.
} No. 1024.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the circuit court of the United States for the western district of Arkansas for having murdered one Ernest Melton, a white man and not an Indian, at the Cherokee Nation, in the Indian country. He was convicted on February 27, 1895, and sentenced to be hanged.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing at an early day during the next term.

Notice of this motion has been served on the defendant and his counsel in the court below, and they consent that the motion may be granted.

HOLMES CONRAD,
Solicitor-General.

17730

Office Supreme Court U
FILED.
NOV 11 1895
JAMES H. McKENNEY,
CLERK

.....IN THE.....

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

No. ~~1894~~ 620

CRAWFORD GOLDSBY, alias Cherokee Bill,
Appellant,

vs.

THE UNITED STATES,
Appellee.

BRIEF FOR APPELLANT.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

THOMAS & RIGGINS, PRINTERS, FT. SMITH, ARK.

.....IN THE.....

SUPREME COURT OF THE UNITED STATES,

CRAWFORD GOLDSBY, alias Cherokee Bill,

Appellant,

VS.

THE UNITED STATES,

Appellee.

STATEMENT OF THE CASE.

The appellant, Crawford Goldsby, is one half-blood Negro and Cherokee Indian, and was raised in the Cherokee Nation, and is what is called in that country, a Cherokee Freedmam.

He was nearly 19 years old when arrested on the 30th day of Jan., 1895, in the Cherokee Nation, and on the 31st day of Jan. 1895, was brought to and confined in the United States jail at Fort Smith, Arkansas, where he has since remained.

On the 8th day of Feb., 1895, said Goldsby was indicted by the grand jury in the United States Circuit Court for the Western District of Arkansas, for the murder of Earnest

Melton, and on the next day was arraigned and plead not guilty to said indictment and said case was set for trial on the 19th of Feb., 1895 and he was put upon trial on the 25th day of Feb., 1895, 26 days after being lodged in said jail and 16 days after being arraigned on said indictment.

Appellant was convicted of murder on said trial and on the 13th day of April, 1895, was sentenced to be hung on the 25th day of June, 1895.

It was claimed by the prosecution on said trial that the appellant, Goldsby, and a small Cherokee Indian man, supposed to be Jim French, on Friday, Nov. 9th, 1894, about 12 o'clock noon, rode on horse-back into the small town of Lenapah, in the Cherokee Nation, on the Arkansas Valley R. R., and robbed the store of one John Shufelt and while engaged in said robbery, shot and killed said Earnest Melton.

(See testimony of John Shufelt (printed transcript p' 18) as to date of said killing and W. S. Melton (Tr. p. 30,) and Harry Clark Tr. p. 31) and it was conceded on said trial that said robbery and killing was done about noon on Friday, the 9th day of Nov., 1894.

The defence was an alibi. The appellant claimed and proved by a number of witnesses on said trial that on Thursday morning, the 8th day of November, 1894 he left his mother's house at Fort Gibson, Cherokee Nation, about one hundred miles east of Lenapah, the place of said killing, (see testimony of George Walsh as to letters fixing the date of Thursday, Nov. 8th, 1894, that appellant left Fort Gibson, I. T., Tr. p. 105, also in the same connection see testimony of

John Vann, Tr. p. 106, also in the same connection see the testimony of Mrs. Ellen Linch, Tr. p. 108, also in the same connection see the testimony of Georgia Brown, who testified with the letter in her hand, of Thursday, Nov. 8th, 1894, fixing the date that appellant left Fort Gibson, Tr. p. 110, also in the same connection see testimony of Jacob B. Young of Fort Gibson, Tr. p. 113, also in the same connection see testimony of Clarence Goldsby, Tr. p. 114, also in the same connection see testimony of Mrs. Ellen McGee, Tr. p. 116, also in the same connection see testimony of Mandy Foster, Tr. p. 117.) It was also conceded on said trial that the town of Fort Gibson, I. T., [where the appellant left on Thursday morning, Nov. 8th, 1894,] was about one hundred miles from the town of Lenapah, I. T., the place of the alleged killing, (see testimony of George Vann, Tr. p. 84 for distance from Fort Gibson, I. T., to Lenepah) then that appellant went on Thursday, the 8th of Nov., 1894, to the home of Mrs. Lena Cochran, 6 miles south-east of Claremore, I. T., (see testimoney of Lena Cochran, Tr. p. 93 and 94) and stayed over night Thursday night Nov. 8th, 1894, and on Friday morning the 9th of Nov., 1894, the same day of the alleged killing, *then 60 miles from Lenapah* (said place of the killing) appellant was seen by Samuel Candy, who traveled one and one-half miles with him that morning on the road, [see testimony of Sam Candy, Tr. p. 90] and appellant was going toward Claremore, [and as claimed by appellant, was then on the morning of the alleged killing] [from 50 to 60 miles from the place of the alleged killing, Lenapah, and

could not, by any possibility, have reached Lenapah by noon of that day, Nov. 9, 1894,] and that appellant turned south of Claremore and went, [on horse-back as before] toward the Creek Nation, and at the time of the alleged killing was at Tom Lowe's, 5 miles north-east of Tulsa, Creek Nation, and 65 miles from Lenapah, the place of the said killing, [see testimony of Tom Lowe Tr. p. 85,] and then went to Jo Roache's [see Tr. p. 81] about the middle of the day, Friday, Nov. 9th, 1894, the day of the alleged killing at Lenapah, [Lenapah being some 60 miles from Joe Roache's.]

That then appellant being about 60 miles from the place of the alleged killing, went to one Jim Turley's [see testimony of Jim Turley Tr. p. 97] also about 5 miles from Tulsa, Creek Nation, and about 60 miles from Lenapah, Cherokee Nation, the place of the alleged killing, and three days prior to the second Monday of Nov., 1894, [12th of Nov. 1894, being the first day of the Cherokee Council, a day memorable in the minds of every man in that country,] thence that appellant went on to Tuck Roache's on said Friday, Nov. 9th, 1894, and from Tuck Roaches to John Foreman's about midnight, Nov. 9th, 1894, about 20 miles south-east of Tulsa and about 50 miles from Lenapah, the place of the alleged killing, [see testimony of John Foreman, Tr. p. 77] and that appellant went on to William Vance's next day some 75 miles from Lenapah, the place of said killing.

There was but one issue upon the trial of this case and that was, was it appellant that was with the Indian, Jim French, and was it the two [appellant and Jim French] who were the

two men engaged in said robbery and the killing of Melton at Lenapah, Friday, Nov. 9th, 1894, or was it some other person with Jim French at said killing, and not appellant Goldsby.

It was claimed at the trial by appellant and his counsel that it was Sam McWilliams alias Verdigris Kid and said Cherokee Indian, Jim French, who did said robbery and killing and not appellant Goldsby, but that Goldsby was elsewhere as before stated.

BRIEF AND ARGUMENT.

We submit that the court erred on Feb 12, 1895, in overruling appellant's motion for a continuance as embraced in his first application for witnesses on Feb. 12, '95, (for the reason that having been first committed to jail on the 31st day of January, 1895, and having had no preliminary or commissioner's examination of his case, and in the sense and meaning and spirit of the constitution of the United States, he had not been "informed of the nature and cause of the accusation against him"—in other words the facts and circumstances of the alleged killing had not been made known to him by witnesses before the United State's Commissioner, that he might be fully informed of the charge and prepare to meet it.) [See first assignment of errors Tr. p. 138,] [and application and motion for a continuance Tr. p. 7 and 8 and 9 and 10.] The time was so extremely short from the filing of the indictment to the time set for trial, and in view of the fact that the place of the alleged killing and locality from which the witnesses must

come, was about 180 miles from the court, and scattered over a large scope of thinly settled and wild country and no time for appellant or his counsel to obtain information in regard to the proper witnesses to apply for. It was forcing appellant to trial without a reasonable time to secure his witnesses and prepare his defense.

The appellant should have been granted a continuance for a term. He had just been indicted, and it is not one murder case out of ten where a trial is had in his Honor's court at the same term in which the indictment is found. Such great haste in disposing of appellant's cause was not necessary, the country, society nor the government neither, could have been injured, The appellant was in jail, he was secure, he was in the hands of the law. If the charge of murder against him was a true charge, time would develop the strength of the government's case and the truth could be better known, the law vindicated and the appellant, if guilty, brought to justice.

The appellant, to prove his alibi and defense, filed on the 12th day of Feb., 1895, his application verified on oath, praying for twenty six witnesses at the expense of the United States, (which embraced a motion for a continuance as aforesaid,) [see said first application for witnesses, Tr. p. 7.] [and order allowing part of said witnesses, the residue overruled or rejected, Tr. p. 3.]

We submit that the court erred in overruling appellant's first application for Ellen McGee, Manda Foster, a man whose name was unknown (afterward found to be a butcher named Ross,) Mary Hendricks, wife of Tom Tane, wife of Joe

Roach, wife of Tuck Roach, wife of John Foreman, wife of William Vance and wife of Robt. Turner as witnesses applied for in the first application, for the reason that the facts that appellant could prove by said witnesses as shown by said application were in the light of the issue of an alibi, as presented in the case competent and very material to his defense, [see also second assignment of errors Tr. p. 138.]

We submit further that the court erred on the 19th day of Feb., 1895, in overruling appellant's third application for witnesses Tom Harris and Minerva Harris, [see appellant's third application for Tom and Minerva Harris as witnesses, Tr. p. 12.] [see also third assignment of errors, Tr. p. 138] and the reasons and facts stated in said assignment made part thereof without repeating.

We submit further that the court erred on the 23d day of Feb., 1895, in overruling appellant's motion for a continuance embraced in his fourth application for eight newly discarded witnesses, [see motion for continuance filed and overruled Feb. 23d, 1895, Tr. p. 13.] For the reason that the court had previously on the 12th day of Feb., 1895, and on the 16th day of Feb., 1895, allowed defendant Alex Cochran and George Marcum and William Smith and one Butcher Ross and subpœnas for said witnesses were duly placed in the hands of the marshal and the defendant had no further control over the subpœna and defendant had used all the diligence in his power to procure said witnesses, who were then not in attendance, and that the facts to which they would testify as shown by the application (in the light of the issue presented) were

competent and material. And for the further reason as shown by said motion and further application that defendant since filing his previous third application had learned eight additional witnesses, (see fourth application made part of the motion to continue,) and in the light of the issue presented the facts that defendant could have proven by said witnesses, as shown by said application, were competent and very material to his defense, to show that defendant was not one of the two men who engaged in the robbery and alleged killing, [see fourth assignment of errors, Tr. p. 139.]

We submit further that upon the showing made by appellant in his motion for continuance embraced in his fourth application for witnesses, gave him an absolute right to a continuance of his cause to the next term. Appellant had shown all the diligence possible under the circumstances to have been used, in order to secure the attendance of witnesses already allowed him but not in attendance, and the materiality of said witnesses is fully shown by said applications in the light of the issue presented.

We submit further that the fact, that between the time of filing the third application and the fourth application, appellant had obtained information of eight additional newly discovered witnesses, [see fourth application and motion to continue, Tr. p. 13,] goes to show that a continuance of his cause was necessary that justice might be done him in the premises and that he might have time to procure said eight witnesses, so important to his defense, that if still the court refused to allow them at the expense of the United States,

that yet through the aid of his friends, appellant might still secure their attendance, if time was granted him.

We submit further that the facts stated in the applications to which the witnesses would testify and verified therein also by appellant to be true, must for the purposes of this appeal and the questions now presented be taken as true. Revised statutes of the U. S., 1878, Sec. 878, requires the appellant to state briefly the facts he expects to prove by these witnesses that the court may see if the facts so presented are material to the issues presented on the trial. All the applications filed by appellant had presented but one issue and that was the issue of an alibi, steadfastly maintaining that appellant was not one of the two men engaged in the alleged robbery and killing, [see fourth application and motion to continue, Tr. p. 13.] The fourth application gave the names and residence of six persons in and about Lenapah, who had seen the alleged robbers, and which witnesses would show them to have been a small Indian (Jim French, as we claim) and a white man, neither of whom could have been appellant because he was a black man of the African race, certainly these latter witnesses were exceedingly material and would have, beyond a doubt, secured appellant's acquital.

If the refusal to allow appellant these witnesses did not injure him or prejudice his case, or the witnesses from the facts presented by the application would not have been competent, or if being competent were yet not material or of but little or no weight and could not have changed or affected the verdict, had they been before the jury, then

possibly there might be some shadow of claim that the refusal to allow them was not error. *But how did the case then stand?* The facts proposed to be shown by these latter witnesses was the very gist of the case, to-wit that the robbers neither of them were appellant and must have secured appellant's acquittal.

We call attention to the fact that not a single witness produced by the government who claimed to have seen the alleged robbers made any claim to having ever seen the said robbers before. They claimed no knowledge or acquaintance with appellant but that at the robbery they had seen appellant for the first time in life, and how easily could they have been mistaken. Most all these identifying witnesses were more or less under the influence of Shufelt, (the party robbed) and who was prejudiced against appellant and doubtless more or less influenced these so-called identifying witnesses, who were his patrons in his store and whom he favored by carrying their accounts from one crop gathering to another, and some of them were his day laborers for years and under his thumb and it required no great stretch of imagination with them on a matter of opinion to put appellant there as one of said robbers.

But by some of the newly discovered and applied for witnesses, appellant also proposed to show that immediately after the robbery, Shufelt had said they were a white man and a small Indian.

There was a difference of testimony and opinion among those who did see the said robbers, and who did testify at the

trial as to the identity of said robbers, and who they were, etc. [See the testimony of George Merril, Tr. p. 65,] who was present and saw said robbers, and knew appellant for six years, and Jim French also before the robery, and stated that appellant was neither of the robbers, but that one of them was Jim French, afterwards killed and brought here to the U. S. jail and fairly identified as one of said robbers by government witness John A. Smith, who saw his dead body here [see Smith's testimony on cross examination Tr. p. 41,] and the other a white man. Also in the same connection [see testimony of Tom Harrison, Tr. p. 103,] who was a government witness not called by the appellant, who saw the robbers pass his wagon as they went into Lenapah and who says the small one of them was an Indian, and the other looked like a white man not a negro. Also in the same connection the testimony of Robert Harris, a government witness, not used by them [Tr. p. 102,] but called by appellant, who saw the robbers at the robbery and stated one was an Indian and not appellant, and he would not say the other man was appellant although in twenty feet of him at the robbery, and if appellant (a Negro with his curly hair) had been there though with his back to Harris, the latter would have identified him.

We submit that Sec 878 of the Revised Statutes of the United States of 1878 and Art. 6 of the Amendments to the Constitution of the United States, made it binding on the court below, when appellant filed his application verified by affidavit, stating briefly what he expected to prove by each witness, that the witnesses wese within the jurisdiction of the

court and were material to his defense and that appellant was poor and unable to pay the fees of said witnesses, and asking the court for witnesses in his behalf at the expense of the United States, to allow said application for such witnesses and order them subpoenaed. This statute makes no exceptions or qualifications nor does it limit the number of witnesses to be allowed in any case, nor does it leave it with the court to say whether the witnesses applied for are material or not or to reject them because not material. It is enough that the applicant states that they are material. The statute leaves the court no discretion about it, it was not intended that it should leave it to the whims of any trial court as to whether he would allow a man charged with crime, witnesses at government expense or not. If such was the construction to be placed on this statute, then as to whether a man charged with crime would get witnesses in his behalf at the expense of the government or not, would depend on the disposition, temper, etc., of the judge he happened to be brought before—and if it happened to be his misfortune to be brought before some miserly, economical, hide-bound court for trial, then he perhaps would get no witnesses at all, and just as well plead guilty. But if, upon the other hand, it was his good fortune to be brought before some noble minded, generous hearted, broad-guage court, he would get the witnesses the law contemplated he should have, "*and that is all the witnesses that are material for his defense, all that seem to be material to meet the issues presented in the case on his part.*" Any other construction placed on this statute would make it a

trap and a snare, and it would fall short of meeting the constitutional guarantee that every man charged with crime shall have compulsory process for witnesses in his behalf. The district attorney is not restricted in any manner as to what or how many witnesses he shall order at the expense of the government. If equal and exact justice is to be done, the same rule should apply to each side of a case.

In the light of the evidence given before the jury at the trial and assuming that appellant could have proven substantially what is stated in his applications, that he could prove by witnesses refused him by the court, [had the latter witnesses been present and testified before the jury on the trial also.] It is clear to be seen that appellant without a doubt would have been acquitted of the charge of murder on said trial. Then if the result of allowing the appellant all the additional witnesses thus applied for by him, and having them present at the trial would have been to secure his acquital on said trial and thus saved his life, then the refusal of the court to so allow appellant the said additional witnesses, was to cause his conviction on said past trial. And if the verdict of the jury at said trial is to stand and be enforced, then the refusal of the court to allow said additional witnesses amounts to taking the appleant's life away from him. Then if it could be said that the court had the discretion to refuse to allow appellant said additional witnesses, then on the same parity of reasoning, it might be said that the court held the life of the appellant in his hands, and if, in his discretion, he saw proper to refuse

him said additional witnesses, and the appellant, being poor, could not procure them at his own expense, then the court at his *discretion* could cause appellant to be convicted and take his life away frow him, or at his *discretion* could cause appellant to be acquitted and restored to his liberty and his friends. Such is not the law of this country. If it was it would be an abuse of discression and mockery of justice, and it would constitute every trial judge in the land a monarch with power at his will to convict and take the life of any person put on trial before him for a capital offense.

We submit that it is plain to be seen in the premises that if the court below had allowed the appellant all the additional witnesses applied for by him and continued his cause for a term in order to have secured the attendance of said witnesses, the appellant without the shadow of a doubt would have been acquitted on a trial. Then the refusal of the court below to allow him said additional witnesses, deprived him of a substantial and legal right and had the effect to cause him to be convicted of murder, and is an error for which this cause should be reversed and remanded for a new trial.

We submit further that the court erred in refusing to allow appellant to prove by one James Rose, that the same day of the alleged killing, government witness John Shufelt and his father were together in said Shufelt's store at Lenapah and talking about and giving an account of the alleged killing of Melton, and describing the two men who robbed said Shufelt's store, and did said killing, and that in the conversation between said two Shufelts describing said robbers, the father

of John Shufelt said in the presence and hearing of witness and said John Shufelt, that the largest one of said robbers was a white man and rather red complected, and the smaller one of said robbers was an Indian most a full blood, who was a small man weighing about 140 pounds. This statement by John Shufelt's father was made in the presence and hearing of John Shufelt, who did not contradict it, and in the same conversation with said witness Rose, John Shufelt and his father. [See sixth assignment of errors Tr. p. 139 and see testimony of James Rose Tr. p. 64.] The statement of old man Shufelt, John Shufelt's father, in the presence of John Shufelt and in the same conversation where John Shufelt heard the statement of his father and had an opportunity to deny or correct the statement, was binding on John Shufelt and was competent evidence to have gone to the jury.

We submit further that the court erred in admitting the testimony of Henry Bascum in rebutial, for the reason that the government having offered evidence tending to show appellant at the place of the killing, should have offered all their evidence upon that qnestion in chief. [see seventh assignment of errors Tr. p. 139 and testimony of Henry Bascum Tr. p. 123.]

We submit further that the court erred in admitting the testimony of Heck Thomas, a government witness, against appellant for the reason that appellanf had not been served with notice of said witness Thomaf, 48 hours before his trial,

Sec. 1033 Revised Statutes U. S.

and the further reason that the testimony of said Thomas was

not competent in rebuttal or otherwise, [see eighth assignment of errors Tr. p. 139 and testimony of said Thomas, Tr. p. 127.] The testimony of said Thomas in regard to a wire cutter [Tr. p. 127,] is not in rebuttal of anything offered by appellant.

The fact that said Thomas was used in rebuttal does not excuse the government from giving the 48 houres notice as required by the statute.

Revised Statute U. S., Sec. 1033.

Logan vs. the United States, U. S. Sup. Ct. Repts. 144, Bottom page 443.

Whether a witness is used by the government in chief or rebuttal does not change the rule as to giving the notice. The objection to the testimony of Thomas was taken in time, and his testimony was improperly admitted.

The charge of the court [Tr. record pp. 125 to 137,] is given in full in the record, which shows that nearly six pages are devoted to numerous definitions and statements as to what constitutes a willful killing and malice aforethought. The iteration and reiteration of these definitions with occasional references to the inculpatory evidence, and the peculiar manner in which the whole charge is strung together, was calculated to lead the jury to believe that there was an issue as to whether there was a willful and malicious killing or not, but no question as to the defendant's presence and participation in the robbery and his doing the killing, when as a matter of fact taere was no testimony of a wilful and malicious killing, but the defendant's testimony showed that he

was many miles away from the scene of said robbery and killing at the time.

After the extended definitions referred to, the court then says the propositions in this case are few and simple. They are easily understood, etc.

The question, and the great question in the case is whether or not the crime of murder exists according to the definition of that crime as I have here giver it to you. And secondly, whether or not this defendant is the party who commited that crime.

You are to know these truthes by the light of the evidence which has been offered before you, by evidence whether of a positive character or whether it is circumstantial in its nature.

"You have a right to take into consideration in passing upon this proposition, the opportunity the witnesses had for iddntification, the application of that opportunity, whether they told you they ideniified the defendant as one of the participants in that crime, and as the man who fired the shot which took the life of Melton.

That is a positive fact. That is evidence given by ocular proof, by the fact that the circumstances sought to be proven was observed by the application of one of the five senses by the witness or witnesses.

Then you are to take into consideration what circumstances borroborate the positive statements.

The first duty in passing upon the evidence is to find out what is the truth and what is false in the case, and then to see what that testimony that you find to be true, establishes what it proves.

If all of it together, these positive identifying statements of the witnesses who come before you as positive witnesses, together with the circumstances in the case in the case, satisfy your minds beyond a reasonable doubt of the guilt of the defendant as charged, your duty is to convict him of this crime."

[See fourteenth assignment of errors, Tr. p. 140, and charge of the court Tr. p. 134.]

This may be treated as the summing up of the whole case. From this the court goes immediately into a two and a half page definition and discussion of the reasonable doubt, laying down strong warnings and cautionary rules as to the weight to be attached thereto.

The fifth ground of exception to the charge of the court is that the court erred in not giving the law governing the alibi testimony of the defendant and what proving power should attach to the same. [see Tr. p. 137, also the 9th, 10th and 11th assignment of errors, Tr. p. 140.]

Many witnesses were present whose testimony beginning many days before at Fort Gibson and closing with the day succeeding the robbery and murder, presented one of the strongest and most perfectly circumstanced alibis ever proven in a court of justice, yet the court in this most remarkable charge wholly ignores the alibi testimony of the defendant and a careful search of the charge will not disclose any reference directly or indirectly thereto, much less a definition of what constitutes an alibi and its proving power.

How could the jury be properly given as the law, the part of the court's charge italicised and quoted above, without any reference to the verious classes of testimony including the *alibi*, in conflict therewith; where in this whole charge is it left a debatable or open question for the jury to find whether or not the defendant was one of the two men who commited said robbery and did said killing.

If there be some evidence tending to support a disputed fact, it must be submitted to the jury with proper instructions.

Richardson vs. Boston, 19 Howard 263.

Chesapeak & O. Canal Co. vs. Knapp, 2 Pet. 541.

Hogan vs. Page, 2 Wall. 605.

If any *point* presented by the evidence is *omitted* from the charge, either party may require an opinion from the court on that point.

Pennock vs. Diologue, 2 Pet. 1.

An instruction to the jury *founded on* part of the evidence is error.

Greenleaf vs. Bith, 9 Pet. 292.

No instruction to a jury should be given which *assumes* as a matter of *fact* that which is not conceded or established by uncontrodicted proof.

Knickerbocker Life Ins. Co. vs. Foley, 105 U. S. 350.

Second National Bank of Levenworth vs. Hunt, 11 Wall. 39.

Bleoins vs Platt, 99 U. S. 676.

The attorneys for appellant did not ask for any instructions in his case but relied upon the court to give the law. We submit that the charge of the court does not put the case to the jury on fair grounds when there is a failure to explain and put before them the law applicable to an important branch of the case In fact that the failure of the court to instruct them upon the alibi, amounts to withdrawing from them of the evidence upon this branch of the case.

The court should have charged the jury upon the alibi

set up by appellant, where there is testimony that the accused was so far semoved from the place of the crime at the time of its commission as to make it impossible that he could have committed it, the court should instruct the jury on the law of alibi.

State vs. Conway, (Kan. Sup.) 40, P. 661.

When defendant swears that he was not at the place of the homicide when deceased was killed and had nothing to do with the killing and the court fails to charge the law with reference to an alibi, a conviction will be reversed.

Anderson vs. State, Tex. Ct. App. 31 S. W. 673.

Where defendant introduced evidence tending to show an alibi it is the duty of the court to instruct the jury on that subject.

Garcia vs. State; (Fla.) 16 S. O. 223 34, Fla. 311.

CLOSING POINTS.

1st. We submit in conclusion: That the appellant was forced to trial with unreasonable haste wile praying for a continuance of his cause in order to prepare his defense; considering that there was but 17 days from the filing of the indictment to time of the trial; the gravity of the charge; the appellant confined in jail; the long distance from where the court is held to the locality where the crime is claimed to have been committed, and in a sparsley settled, wild country where much time is required to obtain information and secure witnesses.

2nd. That the appellant was denied necessary and material witnesses in his behalf, which it was his legal and constitutional right to have when he had complied with the law by filing his application as the law required and as he had done. (See Sead Rev. Stat. Sec. 878.) The whole number of witnesses applied for was but 39, and by inspection of the indictment the witnesses endorsed theron for the government against him was 30 in number.

Appellant was a fellow citizen and entitled to all material witnesses in his behalf.

3rd. That the appellant under the circumstances of this case was entitled to a continuance of his cause, either for a time sufficient to have secured the attendance of all his materal witnesses or to the next term of the court. In this case it was not a matter of discression with the court but an absolute and tubstantial and constitutional right of the appellant; even if it could be classed as a matter of discression with the court, yet it would be such an abuse of discression in depriving a citizen of a substantial and legal and constitutional right that an appellate court would interfere and grant a new trial.

4th. That there was but one issue in the case and that issue was, was the appellant one of the two men who engaged in said robbery and did the alleged killing which involved the *alibi* testimony of the appellant and made it absolutely necessary that the court should charge upon the *alibi*, but that the charge of the court was so abstract and misleading by making the issue a question of intent to kill and malace

aforethought and giving such undue prominence to the identifying testimony of the government at the place of the killing, the effect of which was to conceal from the jury and take away from them the true issue in the case, (to-wit, the *alibi* of the appellant,) and so completely ignored the *alibi* testimony of the appellant that from the charge of the court it could not be known that the appellant had ever introduced a witness in support of his *alibi*.

For the reason above stated we submit that the judgment of the court below should be reversed and a new trial granted.

Respectfully submitted,

WM. M. CRAVENS,

Attorney for Appellant.

Office Supreme Court U. S.
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CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1895.

CRAWFORD GOLDSBY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 620.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

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CRAWFORD GOLDSBY, PLAINTIFF IN ERROR,
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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Crawford Goldsby, *alias* Cherokee Bill, plaintiff in error, was indicted for the murder of one Ernest Melton, a white man, at the Cherokee Nation in the Indian Territory. The murder was alleged in the indictment to have been committed on November 18, 1894, but is shown in the testimony to have been committed November 9, 1894 (p. 18). He was tried February 25–27, 1895, before Judge Parker and a jury, and convicted.

STATEMENT OF FACTS.

The murder was committed at Lenapah, on the Kansas and Arkansas Valley Railroad, 12 miles south of Coffeyville, Kans. (p. 18). It was committed in the course of a robbery of a store kept by one John Schufeldt and his father. Two armed men attacked the store, made the occupants hold up their hands, and robbed it in the usual way. During the course of the robbery, Melton, the deceased, looked out of the window of a building some 130 feet away to see what was going on, and was shot apparently in mere wantonness by one of the robbers. A number of eyewitnesses positively identified this defendant, Cherokee Bill, as one of the robbers, and as the one who fired the fatal shot (pp. 17, 27, 31, 45.) Defendant is of mixed blood—negro and Indian, with perhaps some white blood (p. 40); according to one witness "pretty well mixed up. Indian, white man, and negro, I suppose" (p. 50). The other robber, who stayed on the outside entertaining himself by shooting around at random, seems to have been a young quarter-blood Indian. Opinions differ as to whether he had Indian blood, and if so, how much. The deceased, however, was a white man.

Cherokee Bill did not take the stand in his own behalf. His defense was in the main an attempt at proving an *alibi*, which attempt, however, most conspicuously failed, most of his witnesses being unable to identify precisely the day on which they saw him at other places than Lenapah, while the testimony of those who were better able to fix dates was not inconsistent with defendant's presence at Lenapah at the time mentioned.

ALIBI TESTIMONY.

The crime was committed on Friday, November 9. It seems well established that defendant spent the night of Wednesday, November 7, at Fort Gibson. By the stress laid on this fact, it might be supposed that Fort Gibson was at some great distance from Lenapah, requiring more than a day and a half for the journey. It is, however, on the same line of railroad, apparently, from the map, some three hours distant by train. Other places on the railroad between these two points which are mentioned in the testimony are Nowata, Talala, Claremore, Inola, and Wagoner. Catoosa and Tulsa are on another line of railroad, connecting with the above-mentioned line at Claremore, the terminus of which is Sapulpa, which is about the same distance from Lenapah as is Fort Gibson. All the points mentioned are quite near one of these railroads, except the house of John Foreman, where defendant is claimed to have called at some hour during the night after the robbery. This house is about 15 miles from the railroad station at Talala, which is 20 miles or thereabouts south of Lenapah.

ASSIGNMENTS OF ERROR.

I–IV. The first four assignments of error relate to rulings of the court in denying applications for a continuance and for subpœnas at the expense of the United States. The latter applications were made under § 858 of the Revised Statutes, which provides that upon affidavit, if there are material witnesses within the district whom the defendant is pecuniarily unable to obtain, the

court or judge "*may* order that such witnesses be subpœnaed if found within the limits aforesaid," the cost to be paid by the United States.

It is well settled that even in a murder case such applications are addressed to the discretion of the court, which discretion is not subject to review. (*Crumpton* v. *United States*, 138 U. S., 361, 364.)

Applications for *continuance* are also addressed to the discretion of the court and not subject to review. (*Woods* v. *Young*, 4 Cranch, 237; *Wright* v. *Lessee of Hollingsworth*, 1 Pet., 168; *Sims* v. *Handley*, 6 How., 1, 5, citing 6 Cranch, 218; *Barrow* v. *Hill*, 13 How., 54, 56; *Spencer* v. *Lapsley*, 20 How., 264, 267; *Cox* v. *Hart*, 145 U. S., 376, 380; *Earnshaw* v. *United States*, 146 U. S., 60, 68.)

It has, indeed, been suggested that an application for *postponement* may possibly be denied in so unfair a manner as to allow a review. (*Means* v. *Bank of Randall*, 146 U. S., 620, 629.) The cases referred to in *Earnshaw* v. *United States*, *supra*, were of this kind. This, however, was not an application for mere *postponement*. No such application was made. The application was to send the case over to the next term of court, which would involve a delay of nearly three months in the trial, and would mean also great expense to the Government, which had collected its witnesses at Fort Smith ready for the trial. The last application for a continuance was made and denied on February 23. The trial actually began February 25 and ended February 27. It might have been postponed for a few days longer if the prisoner's

counsel had asked for such postponement. As it was, they had ample time to collect their witnesses, all of whom lived on or near the railway and within a few hours' distance of the court-house, as may be seen by the map, except one at Kansas City, also an entirely accessible point.

The first and second assignments of error refer to the overruling of a motion to continue, or, in the alternative, for process at the expense of the United States, in order to obtain the testimony of certain witnesses, some of them named and some only described. The motion is set forth at pages 7 to 10 of the record. The record contains no order denying the motion for a continuance (if this be separately considered), nor does it contain any order denying process at Government expense for any named witness. On the contrary, it recites that (p. 3)—

> Said application coming on to be heard, and the court being fully advised in the premises, *doth allow the same*. It is therefore ordered that the legal expense of procuring the testimony of John Vann * * * in behalf of said defendant be paid by the United States, and that a subpœna be issued for them returnable February 19, 1895.

It would appear from this either that defendant abandoned the application as to the witnesses whose names are not recited in the order, or that his counsel carelessly overlooked having their names entered in the order. He therefore certainly can not complain that they were omitted. In fact, the first two of whose absence he complains, Ellen McGhee and Mandy Foster, actually appeared and testified on his behalf (pp. 116, 117). Most of the

other witnesses mentioned in the second assignment of error were only desired for the purpose of corroborating the testimony of the witnesses with whom their names were respectively joined in the application. (See the testimony of Tom Lowe, p. 85; Joe Roach, p. 81; James Turley, p. 97, and John Foreman, p. 77.)

The third assignment of error relates to the overruling of defendant's application for the evidence of Tom Harris and Minerva Harris. These were both Government witnesses (p. 2); they were present at the trial and defendant's counsel was in consultation with them (p. 101); and Tom Harris testified (p. 103).

Of the witnesses whom defendant was unable to obtain, referred to in the fourth assignment of error, one, Alexander Cochran, seems to have been dead at the time of the trial (compare p. 7, foot, with pp. 93, 95). One of the other witnesses therein mentioned, Bob Harris, was a Government witness (p. 2), and actually appeared on trial and testified for defendant (p. 102). His testimony did not sustain the statements of defendant's affidavit.

It is submitted that an affidavit presented at so late a date should have given better reason to believe that defendant's expectations were justified as to the testimony of the witnesses.

The trivial character of all of the *alibi* testimony offered tends to confirm the belief that defendant was not prejudiced by failure to obtain any more of it than he actually produced before the jury.

V. It is claimed that the court erred in admitting certain testimony with reference to a watch charm. John

Schufeldt, one of the men who were robbed, testified that the man who was assisting this defendant in the robbery took his watch and chain from him (p. 21), and also a watch charm, which was identified at the trial by the witness (p. 27). Paden Tolbert, a deputy marshal, stated that this charm had been given to him by one Charley Patton, who had a store about 15 miles from Sapulpa (p. 55). Charley Patton was then put on the stand and testified about an interview with defendant and a young man called the "Verdigris Kid" in the mountains near his house. During this interview defendant referred to the robbery at Lenapah, saying that he had "made a little hold up and got about $164, as well as I remember, and he had shot a fellow, I believe" (p. 58). At the same interview Verdigris Kid gave witness the watch charm in question in the presence of this defendant. He did not say where he had got the charm, but "said I had better be careful with it or I would get into trouble over it; liable to" (p. 59).

No objection was taken until all of the testimony was in, and after the watch charm itself had been introduced in evidence. The defendant's counsel said: "I don't think it is competent to introduce this testimony." After some conversation between counsel and the court, the court said: "I think it is competent." Defendant's counsel said: "We will save an exception," to which the court answered, "Yes" (p. 59). There is no objection to any question and no motion to strike out any answer. If a motion to strike out had been made, it would have been addressed to the discretion of the court.

The testimony was already before the jury and could not be effaced from their memories. Under these circumstances, even if a regular motion to strike out had been made, error could not have been assigned. (1 Thompson on Trials, §§ 715, 716; *Pontius* v. *People*, 82 N. Y., 339–347; *Gilmore* v. *Pittsburg R. R. Co.*, 104 Pa. St., 275, 281–2; *McFarland* v. *Bellows*, 49 Mo., 311; *People* v. *Long*, 43 Cal., 444; *Brockett* v. *New Jersey Steamboat Co.*, 18 Fed. Rep., 156; *Wilcox* v. *Stephenson*, 30 Fla., 377, 386; *Gurley* v. *Park*, 135 Ind., 440; *Mo. Pac. Ry. Co.* v. *Lamothe*, 76 Tex., 219, 223; *Little Klamath Co.* v. *Ream*, 39 Pac. Rep., 998.)

It is submitted, however, that the evidence is sufficiently relevant to bring it within the discretionary powers of the trial court under the principles of *Moore* v. *United States* (150 U. S., 57) and *Holmes* v. *Goldsmith* (147 U. S., 150).

VI. It is claimed that the court erred in excluding the hearsay testimony concerning the statements alleged to have been made by John Schufeldt's father as to the appearance of the robbers (pp. 63, 64). The declarant was not a witness. Defendant's counsel attempted to get in the evidence on the ground that John Schufeldt, who was a witness, had been present when his father made the statement and did not contradict it. The son testified that he did not think he had heard his father describe the men at all. There does not seem to have been anything said which would make it John Schufeldt's duty to contradict the old gentleman's statement, even if he were mistaken. The court excluded the tes-

timony, saying: "You can impeach John Schufeldt, but you can not impeach him by anything said by his father." We are not able to find any argument or authority to the contrary.

VII. It is claimed that the testimony of Henry Bascomb (pp. 123, 124), admitted by the court in rebuttal, was properly evidence in chief. The court thought otherwise. The question is immaterial, as it is well settled that testimony which would more properly have been introduced in chief may be admitted in rebuttal within the discretion of the trial court, (Wharton's Criminal Pleading and Practice, §566; 1 Thompson on Trials, §346 and cas. cit.; *Commonwealth* v. *Moulton*, 4 Gray, 39; *Commonwealth* v. *Dana*, 107 Mass., 210; *Commonwealth* v. *Mearey*, 151 Mass., 55; *Gaines* v. *Commonwealth*, 50 Pa. St., 319; *Leighton* v. *People*, 88 N. Y., 117; *People* v. *Wilson*, 55 Mich., 508, 515; *Webb* v. *State*, 29 Oh. St., 351; *State* v. *Linney*, 52 Mo., 40; *State* v. *Gadbois*, 56 N. W. Rep., 272; *Turner* v. *United States*, 66 Fed. Rep., 280; *Kansas City R. R. Co.* v. *McDonald*, 4 U. S. App., 563; *Johnston* v. *Jones*, 1 Black, 209, 227) the order of proof in general being subject to that discretion (*Wood* v. *United States*, 16 Pet., 342, 361). The testimony was, however, clearly enough in rebuttal of defendant's attempted *alibi*.

VIII. The eighth assignment of error is as follows:

> The court erred in admitting the testimony of Heck Thomas, a Government witness against defendant, for the reason that defendant had not been served with said witness Thomas forty-eight hours before

> his trial, and for the further reason that the testimony of the said witness Thomas was not competent in rebuttal or otherwise.

The first part of this objection is based on § 1033 of the Revised Statutes:

> When any person is indicted of treason * * * a list of * * * the witnesses to be produced on the trial *for proving the indictment* * * * shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense such * * * list * * * of the * * * witnesses shall be delivered to him at least two entire days before the trial.

It is admitted that Heck Thomas's name had not been furnished to the defendant or his counsel. The court in admitting the testimony said (p. 127):

> The court has always held, if it is in rebuttal, it is absolutely impossible to give the defendant notice of the witness. If that is the rule, that you have to give forty-eight hours' notice to the defendant of witnesses to be used in rebuttal, it would simply amount to a defeat of justice and defeat of a trial altogether. The reason of the rule is very manifest, but when it comes to facts that are purely in rebuttal, no notice can be given, because it is impossible.

We have been unable to find any reported cases precisely in point under our statute or any other statute in the same form. The ruling of the court, however, is in accord with the authorities in Iowa (*State* v. *Gillick*, 10 Ia., 98; *State* v. *Ruthven*, 58 Ia., 121; see also *State* v. *Huckins*, 23 Nebr., 309) under a similar statute, which,

in allowing the district attorney to introduce witnesses whose names were not indorsed upon the indictment, made the following proviso:

> *Provided*, The prosecuting or district attorney gives to the person accused in said indictment, or his attorney, three days' notice, in writing, before the commencement of the trial, that upon the trial of said indictment he will introduce other witnesses whose names shall be set out in said notice than those indorsed upon the indictment. (Laws of Iowa, 1858, ch. 109, p. 211.)

The supreme court of Illinois has gone still further, and held, under a statute somewhat similar to the Federal one, that the court could exercise a sound discretion, so as to allow witnesses to be examined upon reasonable notice, when the statute had not been strictly complied with. (*Gardner* v. *People*, 3 Scam., 83, 89; *Gates* v. *People*, 14 Ill., 433, 436; *Logg* v. *People*, 92 Ill., 598.) To the same effect is *State* v. *Cook* (30 Kans., 82).

Little consideration is needed to convince that notice of witnesses to be used in rebuttal is generally absolutely impracticable. Their very existence is often disclosed by the cross-examination of the witnesses for the defense.

That the Federal statute does not relate to rebuttal testimony is indicated by the phrase "for proving the indictment." We are indebted to Mr. J. B. McDonough, the assistant district attorney, who tried the case at bar for the Government, for the following clear statement of the argument upon this point:

> In introducing these witnesses the Government is not proving the indictment; it is rebutting the evidence of the defendant. To hold that the Govern-

ment must give notice of witnesses whose testimony can not at the time be conceived to be relevant is not only to require an impossibility, and to establish an absurdity, but also to work an injustice. Suppose, in this case, that defendant had placed upon the witness stand in his defense witnesses A, B, C, and D, and that these witnesses had sworn that at the very hour of the robbery and killing the defendant was on the streets of Fort Gibson, 80 miles away; and suppose that the Government could prove by 500 men that defendant was not at Fort Gibson at that time, would notice be required of these 500 witnesses? Or, suppose that it was a well-known fact that the said witnesses A, B, C, and D were, at the hour they say they saw defendant at Fort Gibson, actually in Fort Smith, Ark., and that the Government could show by 500 citizens of Fort Smith that A, B, C, and D were not in Fort Gibson at that hour, but were in Fort Smith, would notice be required of these 500 citizens of Fort Smith? Such a practice would permit the defendant to introduce testimony that could only be known to him until his evidence was introduced, and to add falsehood after falsehood to his defense, things that might be contradicted by numbers of persons if it could only be known beforehand that he would introduce such testimony, and deny to the Government the right to contradict these well-known falsehoods, which no human foresight could tell would be relevant, or would be offered in evidence. Nothing but omniscience on the part of the prosecuting officers could prevent the construction of a wall of falsehoods about every defendant. In cases where the defendant procured his witnesses at his own expense the Government would have no means of knowing a solitary fact that defendant would at-

> tempt to prove in his defense. Every particle of his testimony would be in his own breast, and the Government could not tell whether any witness or a thousand witnesses would be needed in rebuttal. The Government not only would not know the name of any witness, but would know no fact that they wanted to prove in rebuttal by any witness. The Government has no knowledge of what the defendant expects to prove in his defense until his defense is stated by counsel or until his witnesses have testified. Then it is impossible for the Government to know what facts they want to prove in rebuttal. It being impossible to know what facts the Government will want to prove in rebuttal, it is equally impossible to know the names of witnesses by whom it is expected to prove these unknown facts. It can not with reason be said that the Government must furnish the unknown names of these unknown witnesses to prove these unknown facts.

Defendant's remedy, in case of surprise, is to move for a postponement.

To the same effect, see remarks of Christiancy, J., in *Hill* v. *People* (26 Mich., 496).

The testimony offered was to the effect that on November 16, one week after the murder, defendant was wearing a certain kind of hat and had a wire cutter in his possession (p. 127). The testimony concerning the wire cutter was called forth by some unexpected testimony relating to the *alibi*, a geographical expert in that neighborhood having been put on the stand to prove that it would be especially difficult to ride across country from Fort Gibson to Claremore or from Claremore to Lenapah, because the country was "fenced up terribly" with wire fences

(pp. 84, 85). It would appear that men sometimes carry wire cutters in that country in order to cut their way through the fences (p. 89). This matter of local knowledge seems to have been in the mind of the court when the offer of proof was held to be proper rebuttal evidence. A question having been raised as to the time which it would take defendant to ride across a given amount of country on November 9, the fact that within a week of that time he was known to be in possession of a wire cutter would have some slight bearing on the question; and the admission of evidence to that effect would therefore be within the discretion of the trial court, within the principle of *Moore* v. *United States* (150 U. S., 57). The evidence was also offered in rebuttal of testimony concerning the color of defendant's hat, unexpectedly pressed at the trial by his counsel.

Even if there was error, however, the error was not prejudicial. The evidence given by Mr. Thomas can not have had any weight in the case. Thomas testified on direct examination that he tried to capture defendant at Frank Daniels's, near Sequoyah, on November 16, and got his horse the next morning, and that in the outside pocket of the saddle there was a pair of wire cutters. On cross-examination, however, it turned out that it was so dark at the time of the fight, and the contestants were at such a distance from each other, that witness was unable to distinguish any man's features in the opposing band. It was also brought out that there was a hat attached to the horse, which was a large black hat with a little white plume in it. There had been a large amount of testimony

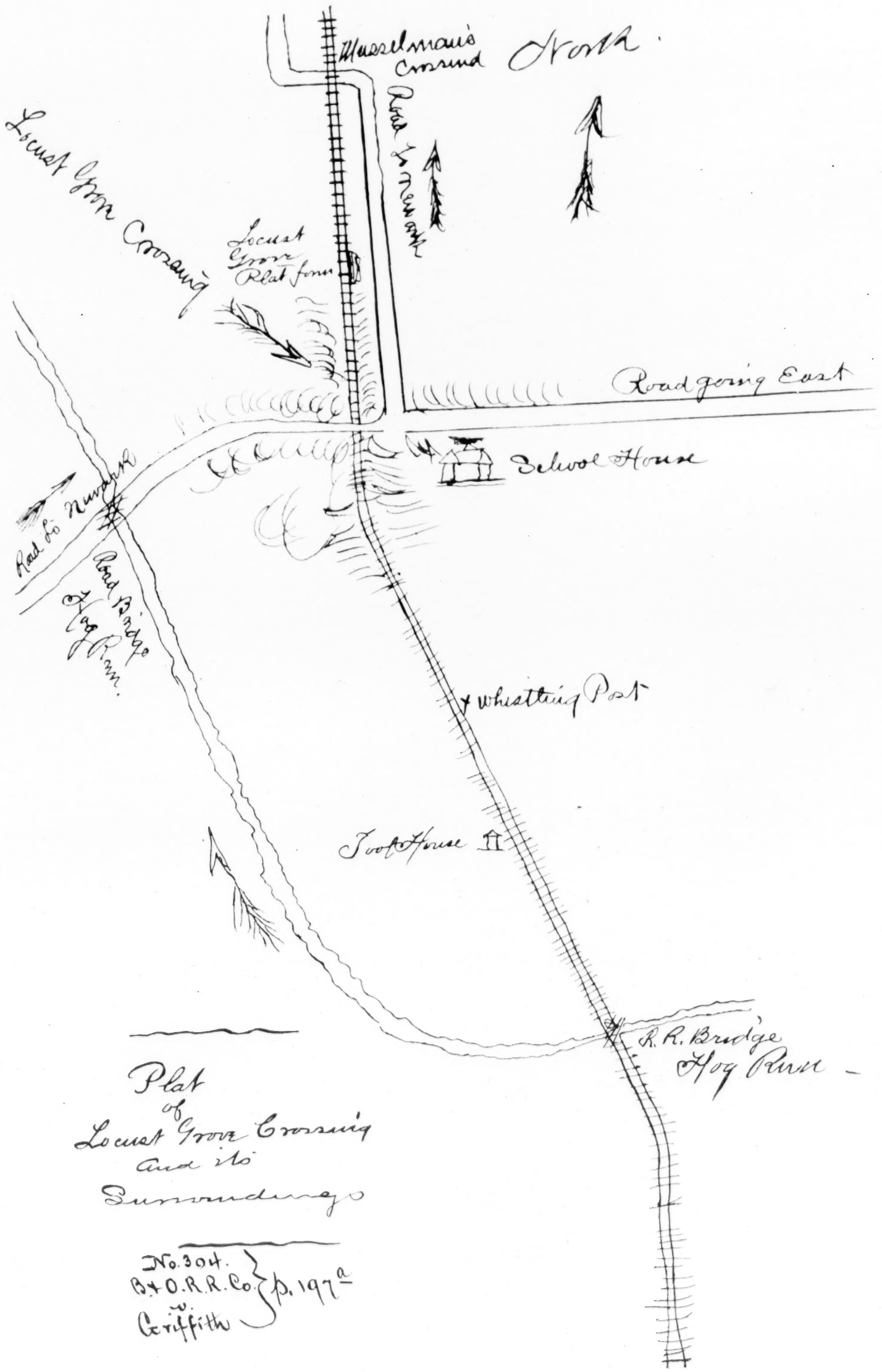
introduced as to the hats that this defendant wore at different times, but nothing in this man's testimony can have had any weight, as it entirely lacked any connection with the witness. Even in a criminal case an error is to be disregarded if not prejudicial to the accused. (*Allis* v. *United States*, 155 U. S., 117, 119.)

Defendant's counsel did not even think it worth while to renew his objection at the close of the testimony of this witness, or move to strike out all or any part of it, or ask a direction that it be disregarded.

IX–XIV. These assignments relate to the charge of the court. The complaint is partly based on the omission of the court to give certain instructions; but these instructions were not asked. They should have been put in the form of requests to charge. (*Texas and Pacific Ry.* v. *Volk*, 151 U. S., 73, 78, and cases cited.) It is believed that none of these assignments require special consideration.

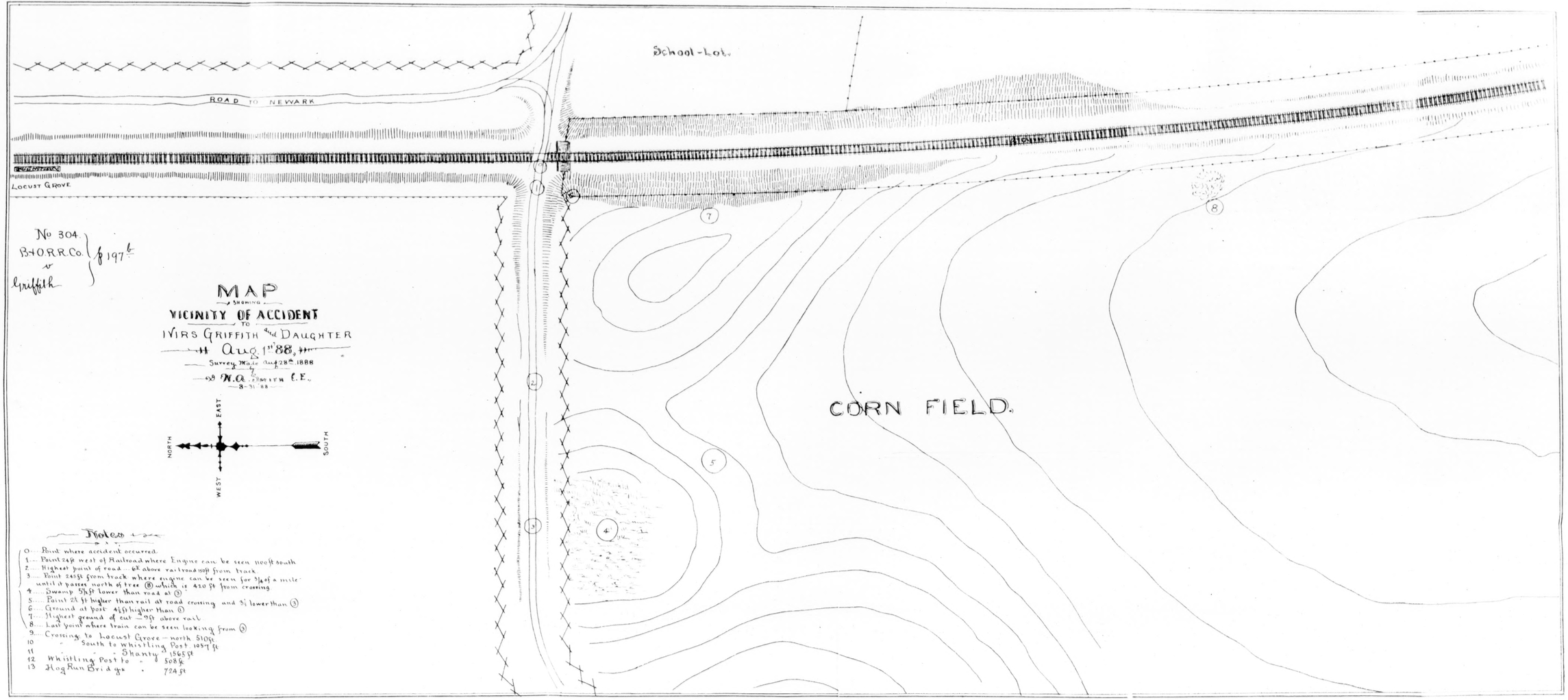
It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.



Plat
of
Locust Grove Crossing
and its
Surroundings

No. 304.
B. & O. R. R. Co.
v.
Griffith
} p. 197a


School-Lot.
ROAD TO NEWARK
CEMETERY
LOCUST GROVE
CORN FIELD.
1
2
3
4
5
7
8
No 304.
B+O.R.R.Co.
v
Griffith
MAP
SHOWING
VICINITY OF ACCIDENT
TO
MRS GRIFFITH & DAUGHTER
Aug 1st 88.
Survey Made Aug 28th 1888
W.C. SMITH C.E.
8-31-88
EAST
NORTH
SOUTH
WEST
Notes
0 Point where accident occurred.
1 Point 24 ft west of Railroad where Engine can be seen 1100 ft south
2 Highest point of road 6 ft above railroad 100 ft from track
3 Point 240 ft from track where engine can be seen for 3/10 of a mile until it passes north of tree (8) which is 420 ft from crossing
4 Swamp 5 1/2 ft lower than road at (3)
5 Point 2 1/2 ft higher than rail at road crossing and 3 1/2 lower than (3)
6 Ground at post 4 1/2 ft higher than (1)
7 Highest ground of cut — 9 ft above rail
8 Last point where train can be seen looking from (2)
9 Crossing to Locust Grove — north 510 ft
10 " South to Whistling Post 1097 ft
11 " " Shanty 1565 ft
12 Whistling Post to " 508 ft
13 Hog Run Bridge " 724 ft